Supreme Court U.S.
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No. 03-031367

In The

Supreme Court of the United States

MICHAEL J. FRANKSTON,

Petitioner,

v.

PATRICK K. GLENN, NEAL KAUFMAN, CIPORA KURTZMAN, ZVI (HARRY) KURTZMAN and ARTHUR SCHWARTZ,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. If the law of a state requires its appellate courts to allow supplemental briefing or rehearing before deciding an issue that had not been raised by the parties on appeal, leading the party who prevailed at trial to believe that it did not need to brief issues not raised by the other side, does the refusal of an appellate court to follow that law constitute an unconstitutional "bait and switch" deprivation of due process because petitioner was given neither notice nor an opportunity to be heard, without any effective remedy other than appeal to this Court?

2. Was petitioner's right to a jury trial denied when an appellate court set aside a jury verdict and ordered entry of judgment for respondents, where respondents had waived any challenge to the sufficiency of the evidence and the verdict was supported by substantial evidence?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	v
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
I. UNDERLYING FACTS	4
II. PROCEDURAL HISTORY	6
A. Trial	6
B. Appeal	7
REASONS FOR GRANTING THE WRIT	9
I. DUE PROCESS REQUIRES NOTICE, AN OPPORTUNITY TO BE HEARD, AND A *MEANINGFUL REMEDY WHEN DEPRIVED OF THOSE*	10
A. Petitioner Had No Notice That The 1995 Summary Judgment Rulings Might Be Considered On Appeal	13
1. Respondents did not challenge the 1995 Rulings	13
2. Failure to raise an issue on appeal waives the issue	14

TABLE OF CONTENTS – Continued

Page

3. An order denying summary judgment is unappealable after a trial on the merits 16

B. The Lack of Remedy Outside This Court Further Violates Petitioner's Due Process Rights 19

II. THE COURT OF APPEAL'S RE-EXAMINATION OF FACTS, IN A MANNER CONTRARY TO COMMON LAW, VIOLATED PETITIONER'S RIGHT TO TRIAL BY JURY 20

A. Respondents Waived Sufficiency-of-Evidence, Too 21

B. Evidence Supporting The Judgment For Petitioner 21

C. Evidence Cited By The Court Of Appeal As A Basis For Deciding In Favor Of Respondents 23

D. The Court Of Appeal's Inferences Are Circular 24

1. It is undisputed that petitioner *had not seen* the documents on file with the S.E.C. 24

2. Even reading Aura's S.E.C. filings would not reasonably have caused petitioner to suspect that his partners had stolen from him 26

TABLE OF CONTENTS – Continued

Page

3. Even if petitioner had inquired, any possible suspicions would have been allayed by respondents' apparently reasonable explanations that the stock issued to respondents was for deferred compensation, known to be due to them, and not a partnership distribution at all 27

CONCLUSION 30

APPENDIX

I. – Memorandum opinion of the California Court of Appeal (September 22, 2003) ..... App. 1

II. Superior Court minute order on summary judgment (October 31, 1995) ..... App. 29

III. Superior Court Statement of Decision re Accounting (August 1, 2000) ..... App. 31

IV. Superior Court Judgment (August 1, 2000) ..... App. 40

V. Order of the Court of Appeal denying rehearing (October 14, 2003) ..... App. 43

VI. Order of the California Supreme Court denying review (December 23, 2003) ..... App. 44

VII. Petitioner's Rule 14.1(g)(i) Statement ..... App. 45

TABLE OF AUTHORITIES

Page

CASES

Ackermann v. Vordenbaum, 403 S.W.2d 362, 9 Tex. Sup. J. 428 (Tex. 1966) 17

Adoption of Alexander S., 44 Cal.3d 857, 245 Cal. Rptr. 1, 750 P.2d 778 (1988) 12

Amer. Physicians Ins. Co. v. Hruska, 244 Ark. 1176, 428 S.W.2d 622 (1968) 16

Angel v. Bullington, 330 U.S. 183, 67 S.Ct. 657, 91 L.Ed. 832 (1947) 20

Baker v. Beech Aircraft Co., 39 Cal. App. 3d 315, 114 Cal. Rptr. 171 (1974) 25

Bell v. Harmon, 284 S.W.2d 812 (Ky. 1955) 17

Bigney v. Blanchard, 430 A.2d 839 (Me. 1981) 17, 18

Brown v. Midland Nat'l Bank, 150 Mont. 422, 435 P.2d 878 (1967) 18

Bush v. Gore, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000) 20

Cargill, Inc. v. Mountain Cement Co., 891 P.2d 57 (Wyo. 1995) 17

Chicago, B. & Q. R. Co. v. City of Chicago, 166 U.S. 226, 41 L. Ed. 979, 17 S.Ct. 581 (1897) 10, 20-21

Continental Ins. Co. v. Whittington, 71 Ohio St. 3d 150, 642 N.E.2d 615 (Ohio 1994) 17

Cook v. Huff, 274 Ga. 186, 552 S.E.2d 83 (Ga. 2001) 16

Deerskin Trading Post, Inc. v. Spencer Press, Inc., 398 Mass. 118, 495 N.E.2d 303 (1986) 16

Estate of Galluzzo, 615 A.2d 236 (Me. 1992) 16

TABLE OF AUTHORITIES – Continued

Page

Feiger, Collison & Killmer v. Jones, 926 P.2d 1244 (Colo. 1996) 17

Fleitz v. Van Westrienen, 114 Ariz. 246, 560 P.2d 430 (1977) 16

Goldberg v. Kelly, 397 U.S. 254, 25 L. Ed. 2d 287, 90 S.Ct. 1011 (1970) 11

Graham v. Long Island R.R., 230 F.3d 34 (2d Cir. 2000) 14

Gurliacci v. Mayer, 218 Conn. 531, 590 A.2d 914 (1991) 17

Harris v. Walden, 314 N.C. 284, 333 S.E.2d 254 (1985) 16

Holloman v. McAllister, 289 S.C. 183, 345 S.E.2d 728 (1986) 17

Home Indemnity Co. v. Reynolds & Co., 38 Ill. App. 2d 358, 187 N.E.2d 274 (1962) 17-18

Howlett v. Rose, 496 U.S. 356, 110 L. Ed. 2d 332, 110 S.Ct. 2430 (1990) 10, 19

Kenney v. Supreme Lodge of the World, LOM, 252 U.S. 411, 64 L. Ed. 638, 40 S.Ct. 371 (1920) 19-20

Klauber v. San Diego Streetcar Co., 98 Cal. 105, 32 P. 876 (1893) 14

Leavitt v. Swain, 133 Idaho 624, 991 P.2d 349 (1999) 16

Lee v. Escrow Consultants, Inc., 210 Cal. App. 3d 915, 259 Cal. Rptr. 117 (1989) 27

McLain v. Ortmeier, 259 Neb. 750, 612 N.W.2d 217 (2000) 16

TABLE OF AUTHORITIES – Continued

Page

Metropolitan Mtg. Fund v. Basiliko, 288 Md. 25, 415 A.2d 582 (1980) 17, 18

Mitchell v. Folmar & Assocs., 854 So.2d 1115 (Ala. 2003) 16

Montana Railway Company v. Warren, 137 U.S. 348, 34 L. Ed. 681, 11 S.Ct. 96 (1890) 14

Myers v. Mo. Pac. RR Co., 2002 Okla. 60, 52 P.3d 1014 (2002) 16

Oliver v. Board of Trustees, 181 Cal. App. 3d 824, 227 Cal. Rptr. 1 (1986) 21

Payless Drug Stores Northwest v. Brown, 300 Ore. 243, 708 P.2d 1143 (1985) 17

People v. Stanley, 10 Cal. 4th 764, 42 Cal. Rptr. 2d 543, 897 P.2d 481 (1995) 14

Reich v. Collins, 513 U.S. 106, 130 L. Ed. 2d 454, 115 S.Ct. 547 (1994) 10, 12

Richard v. Richard, 123 Cal. App. 2d 900, 267 P.2d 867 (1954) 14-15

Roddenberry v. Roddenberry, 44 Cal. App. 4th 634 (1996) 24

Rooker v. Fidelity Trust Co., 263 U.S. 413, 68 L. Ed. 362, 44 S.Ct. 149 (1923) 19

Rosales v. Thermex-Thermatron, Inc., 67 Cal. App. 4th 187, 78 Cal. Rptr. 2d 861 (1998) 30

Shelter Creek Dev't Corp. v. City of Oxnard, 34 Cal. 3d 733, 669 P.2d 948, 195 Cal. Rptr. 361 (1983) 16

Simon v. Craft, 182 U.S. 427, 45 L. Ed. 1165, 21 S.Ct. 836 (1901) 10-11

TABLE OF AUTHORITIES – Continued

Page

Switzerland Ass'n v. Horne's Market, 385 U.S. 23, 17 L. Ed. 2d 23, 87 S.Ct. 193 (1966) 16

Wilson v. Wilson, 54 Cal.2d 264, 5 Cal. Rptr. 317, 352 P.2d 725 (1960) 16

Winbun v. Moore, 143 Wash.2d 206, 18 P.3d 576 (2001) 16

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Constitution, Amendment VII, § 1 ..... 2, 20, 30

U.S. Constitution, Amendment XIV, § 1 2

28 U.S.C. § 1257(a) 1

California Government Code § 68081 ..... *passim*

RULES

United States Supreme Court Rule 13.1 1

California Rules of Court, Rule 14(a)(1) 15

California Rules of Court, Rule 14(a)(2) 15

California Rules of Court, Rule 28(b) 2, 19

PETITION FOR WRIT OF CERTIORARI

Petitioner Michael J. Frankston respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of California in this case.

OPINIONS BELOW

The minute order of the Superior Court in this partnership accounting case, denying respondents' motion for summary judgment and granting petitioner's motion for summary adjudication that he was entitled to a partnership accounting (App. 29-30) is unpublished. The final judgment of the Superior Court (App. 40-42), incorporating two jury verdicts and that court's own Statement of Decision re Accounting (App. 31-39), is unpublished.

The 2-1 opinion of the California Court of Appeal reversing that judgment (App. 1-28) is unpublished, but is available at 2003 Cal. App. Unpub. LEXIS 8951. The Court of Appeal's order declining to rehear the case (App. 43) is unpublished, but is available at 2003 Cal. App. LEXIS 1597.

The California Supreme Court's judgment (App. 44) is not yet published, but is available at 2003 Cal. LEXIS 10135.

JURISDICTION

The order of the California Supreme Court declining discretionary review of the case was entered December 23, 2003. This petition is timely pursuant to Rule 13.1. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Amendment XIV, § 1, provides in pertinent part that, "No state shall . . . deprive any person of life, liberty, or property, without due process of law."

U.S. Constitution, Amendment VII, § 1, provides in pertinent part that, "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

California Government Code § 68081, provides:

> Before the Supreme Court, a court of appeal, or the appellate division of a superior court renders a decision in a proceeding other than a summary denial of a petition for an extraordinary writ, based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party.

California Rules of Court, Rule 28(b), provides:

> The Supreme Court may order review of a Court of Appeal decision:
>
> (1) when necessary to secure uniformity of decision or to settle an important question of law;
>
> (2) when the Court of Appeal lacked jurisdiction;
>
> (3) when the Court of Appeal decision lacked the concurrence of sufficient qualified justices; or
>
> (4) for the purpose of transferring the matter to the Court of Appeal for such proceedings as the Supreme Court may order.

STATEMENT OF THE CASE

This is an action for an accounting and related torts arising out of an investment partnership in which petitioner Michael J. Frankston and the five respondents were the only partners. A jury trial in 1999 resulted in specific findings that petitioner's claims were timely, that respondents had converted partnership distributions intended for petitioner, and that three of the respondents had concealed the theft from him. The trial court separately completed the accounting, making specific findings that the accounting claim was timely, that respondents had deliberately concealed partnership distributions from petitioner (App. 35), and that respondents had failed to account for more than $1.5 million worth of stock they had purchased for the partnership (App. 35-36). Respondents appealed, challenging several trial and post-trial rulings.

A divided panel of the California Court of Appeal reversed and ordered entry of judgment for respondents on grounds that had not been raised by respondents or had been waived. In doing so, the court (1) did not review either the evidence or the trial court's findings on the accounting, choosing instead to review summary judgment rulings that had not been challenged; and (2) substituted its own view of the evidence for the jury's on an issue of reasonableness, based on a circular analysis that had been rejected by both the jury and the trial court.

By considering rulings that had been waived by respondents, without giving petitioner either notice that those rulings were under consideration or any opportunity to be heard, the Court of Appeal violated petitioner's due process rights. By re-examining a factual issue and directing entry of a judgment contrary to the jury's verdict, notwithstanding substantial evidence supporting the verdict, the Court of Appeal also infringed petitioner's right to a jury trial.

I. UNDERLYING FACTS

Petitioner and respondents entered into a partnership in early 1987. App. 2-3. The partners agreed to lend a portion of the proceeds from the sale of stock to a company they controlled, known as Aura Systems, Inc. ("Aura"), when asked to do so by respondent Zvi Kurtzman (RT 1155:8-17)[1], agreeing that Aura would not need to repay the partnership until it could afford to do so CT 719:21-720:1[2]; RT 376:16-377:6; RT 1263:7-11. Petitioner and some of the respondents also made personal loans to Aura, separate from the partnership (CT 127; RT 479:1-15, RT 1637:5-13), and the partners agreed that Aura could defer paying some or all of their compensation for various lengths of time, trying to help build up the company. CT 203-204, 336:12-20.

In the summer of 1988, the partners agreed that Aura would repay $300,000 worth of partnership loans through the issuance of 40,000 shares of new restricted Aura stock to each partner (what the Court of Appeal called the "Partnership Debt Shares") in connection with a contemplated $5 million private placement of new Aura stock. App. 3.

By the fall of 1988, petitioner was becoming concerned that Kurtzman's inclination to exaggerate the company's condition and capabilities made him potentially dangerous as an executive of a publicly traded corporation. RT 522:20-523:10. Petitioner mentioned those concerns in a private letter dated October 17, 1988, to Dr. Rogers Saxon, in response to Saxon's complaints that Kurtzman had not

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[1] "RT" refers to the Reporter's Transcript of oral proceedings in the trial court.

[2] "CT" refers to the Clerk's Transcript of documents in the record on appeal.

kept promises to Saxon. RT 414:23-415:15, 445:13-450:3, Exhs. 12, 13, Kurtzman learned of the letter, and almost immediately devised and implemented a plan to steal petitioner's share of the partnership profits and hide the theft from him.

On October 18, 1988, on Kurtzman's instructions, Aura had issued each of the partners 40,000 shares of Aura stock. Exh. 21. Two days later, **without informing petitioner**, petitioner's shares were divided among the respondents, giving each an additional 8,000 shares of Aura stock. Exhs. 21, 22; CT 722:15-20, CT 1815-1820.

On November 1, 1988, Kurtzman showed petitioner a ledger (Exh. 8), which falsely indicated that no payments or stock issuances had yet been made. CT 126-127. Kurtzman also told petitioner that their previous disputes had all been a misunderstanding. RT 894:19-895:20.

In December 1988, petitioner discussed the private placement and the Partnership Debt Shares with an Aura lawyer, who advised him that the shares belonged to him even though the certificates had not yet been issued. App. 5; RT 517:6-23.

In February 1989, Aura sent various documents filed with the S.E.C. to shareholders, announcing that Aura had completed the private placement, and falsely claiming to have paid off all its outstanding debts. App. 5. Petitioner did not read Aura's public statements because he correctly assumed that they were likely to contain inaccurate information. RT 541:2-25. **No document ever sent to petitioner disclosed the October 1988 issuance of stock to respondents.**

In September 1992, for the first time, petitioner saw internal Aura documents that had been produced by Aura in other litigation, showing that, less than two weeks before Kurtzman had assured petitioner that no partnership distributions had been made to any of the partners,

each respondent had in fact been issued a certificate for 40,000 shares of Aura stock plus another certificate for 8,000 shares. RT 538:1-540:13.

Petitioner filed this action less than two years from this discovery, well within the applicable statutes of limitation.

II. PROCEDURAL HISTORY

Petitioner sued the respondents in the Superior Court of the State of California in and for the County of Los Angeles, in June 1994, for an accounting, and asserted additional claims for conversion, fraud and breach of fiduciary duty.

On cross-motions for summary judgment in late 1995, the Superior Court ruled (the "1995 Rulings") that genuine issues of material fact required denial of respondents' motion for summary judgment on the ground that petitioner's claims were time-barred, and that petitioner was entitled to an accounting as a matter of law on the undisputed facts. App. 29-30.

A. Trial

It is undisputed that petitioner did not have actual notice of respondents' actions until less than two years before the action was filed. After several weeks of trial in mid-1999, a jury found, in response to special interrogatories, that petitioner did not learn facts that put him on constructive notice of any of his tort claims until September 1992 or later.

On the basis of the evidence at trial, as stated in its Statement of Decision re Accounting (App. 31-39), the trial court found that:

(1) respondents failed to meet their burden of proving what transactions they had engaged in with partnership property, or when, because respondents had never produced any documents showing what they did when;

(2) the partnership was not dissolved by any of respondents' secret conduct in 1988 through 1994, but by petitioner's filing of the complaint in June 1994;

(3) respondents still held 166,382 shares of the stock bought for the partnership when petitioner filed the complaint, but never accounted for any of those shares, in violation of their legal obligations;

(4) respondents took profit distributions in October 1988 but concealed those distributions from petitioner by presenting him with a fraudulent preliminary accounting; and

(5) petitioner did not learn facts that gave him actual or constructive notice that he was not going to receive any further partnership accounting until September 1992.

On the basis of these findings, judgment was entered for petitioner on August 1, 2000. App. 40-42.

B. Appeal

Respondents appealed to the Second District of the California Court of Appeal, challenging ten aspects of the trial and accounting. Significantly, respondents made no challenge to the propriety of any pretrial ruling, and did not even mention the 1995 Rulings in their opening brief or in oral argument.[3] Accordingly, petitioner's brief to the

[3] The issues actually raised by respondents in their opening brief to the Court of Appeal ("AOB") were: (1) that the jury's finding that petitioner was not on constructive or actual notice of his claims until two years or less before he filed suit was not supported by the evidence

(Continued on following page)

Court of Appeal noted that the summary adjudication ruling stood, but made no effort to present, discuss or analyze the record on which that ruling had been made in 1995. As respondents had briefed only trial and post-trial rulings, so did petitioner.

The Court of Appeal reversed the Superior Court judgment in its entirety, on two grounds. First, although the issue had not been raised by respondents or briefed by the parties, the Court of Appeal reversed the trial court's 1995 order denying respondents' motion for summary judgment. In so doing, the court not only ignored the wealth of evidence presented at trial, but also – in direct violation of § 68081 of the California Government Code – rendered its decision without giving any notice that it was considering the summary judgment rulings and without allowing supplemental briefing.

Second, as to the tort claims, the Court of Appeal reached its own view of the evidence instead of considering all the evidence and inferences in support of the judgment, and directed entry of an order granting respondents' post-trial motion for judgment notwithstanding the verdict.

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at trial (AOB at 23-29); (2) that there could be no conversion as a matter of law (AOB at 29-32); (3) that the damages assessed by the jury for fraud and breach of fiduciary duty had not been proximately caused by respondents' wrongful conduct (AOB at 33-35); (4) that the jury's measurement of damages for conversion was incorrect (AOB at 36-38); (5) that the trial court gave an erroneous damages instruction (AOB at 39-40); (6) that the trial court erred in determining that the partnership was dissolved in 1994 (AOB at 41-42); (7) that the amount of prejudgment interest was calculated incorrectly (AOB at 43-45); (8) that the trial court used the incorrect number of partnership shares in performing the accounting (AOB at 45-50); (9) that the jury should have been permitted to decide respondents' *res judicata* defense (AOB at 5-54); and (10) that a post-judgment sanctions order lacked evidentiary support (AOB at 55-50).

App. 12-19. The Court of Appeal seemed content to determine that there was sufficient evidence to justify a finding of constructive notice, without regard to the substantial and uncontroverted evidence supporting the jury's contrary conclusion.

Petitioner filed a timely petition for rehearing, on the grounds that (1) the Court of Appeal had violated his due process rights by deciding an unraised issue in violation of § 68081 of the California Government Code and that (2) rejection of the jury's verdict on constructive notice was completely contrary to the evidence and improperly invaded the province of the jury.[4]

Despite the unambiguous mandate of § 68081, the Court of Appeal refused rehearing, without explanation. App. 43. The California Supreme Court then declined to review the case, leaving petitioner with no remedy outside of this Court. App. 44.[5]

This petition followed.

REASONS FOR GRANTING THE WRIT

The petition for certiorari should be granted for two reasons.

First, reversing the judgment on the accounting, without giving petitioner any notice that the 1995 summary judgment rulings would be considered, and without giving petitioner any opportunity to be heard, in the face

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[4] Excerpts from petitioner's Petition for Rehearing, showing where the constitutional issues were raised, are included in the Appendix at 45-46.

[5] Excerpts from petitioner's Petition for Review, showing where the constitutional issues were raised in that court, are included in the Appendix at 46-49.

of a statute specifically requiring either an opportunity to be heard before decision or rehearing after, violated petitioner's due process rights. Not only did petitioner have the right to rely on that statute in choosing not to assail the Court of Appeal with rebuttals of arguments that had not been raised, the dictates of judicial economy demanded that petitioner refrain from doing so. Failure to allow petitioner an opportunity to be heard, after the Court of Appeal had decided to consider such an unraised issue, was an unconstitutional "bait and switch" condemned by *Reich v. Collins,* 513 U.S. 106 (1994). Failure to provide an effective remedy compounded the violation. *Howlett v. Rose,* 496 U.S. 356, 369-370 (1990). This issue, having only arisen on appeal, is within the traditional direct appellate jurisdiction of this Court, and is no less important to the federal system because of procedural changes requiring certiorari.

Second, reversing the judgment on the jury verdict as to the tort claims, and directing entry of judgment for respondents, notwithstanding substantial and largely uncontroverted evidence at trial supporting the jury's verdict, deprived petitioner of the benefits of a trial by jury, because the Court of Appeal's review was not in conformance with common law, especially as respondents had waived any argument on sufficiency of the evidence by presenting an improperly skewed record. *Chicago, B. & Q. R. Co. v. City of Chicago,* 166 U.S. 226, 242-243 (1897).

I. DUE PROCESS REQUIRES NOTICE, AN OPPORTUNITY TO BE HEARD, AND A *MEANINGFUL REMEDY WHEN DEPRIVED OF THOSE*

Due process "does not necessitate that the proceedings in a state court should be by a particular mode, but only that there shall be a regular course of proceedings in which notice is given of the claim asserted, and an opportunity

afforded to defend against it." *Simon v. Craft*, 182 U.S. 427, 436 (1901).

"[W]hen a person has a legally enforceable right to receive a government benefit provided certain facts exist, this right constitutes a property interest protected by due process." *Goldberg v. Kelly*, 397 U.S. 254, 261-262 (1970).

By statute, California gives litigants the right to be heard on an issue before an appellate court may decide the issue:

> Before the Supreme Court, a court of appeal, or the appellate division of a superior court renders a decision in a proceeding other than a summary denial of a petition for an extraordinary writ, based upon an issue which was not proposed or briefed by any party to the proceeding, **the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing.** If the court fails to afford that opportunity, **a rehearing shall be ordered** upon timely petition of any party.

Cal. Gov't Code § 68081 (emphasis added).

In this case, petitioner had no notice that the Court of Appeal might consider summary judgment rulings, and was given no opportunity to be heard, either before decision or on rehearing after, as to why those rulings were not adequate grounds for reversing the judgment after trial, despite the statute explicitly requiring rehearing.

Petitioner was entitled to rely on this statute in limiting his appellate brief to the issues actually raised by respondents. By deciding this case on issues that had not been proposed or briefed by any party, the Court of Appeal violated that law. In doing so, it violated petitioner's due process rights. It then compounded the violation by failing to order a rehearing as required by the statute.

A decade ago, this Court considered the due process implications of a decision by the Supreme Court of Georgia

to refuse a remedy to a taxpayer who had paid taxes in reliance on what appeared to be a "clear and certain" post-deprivation remedy, on the ground that Georgia offered an adequate pre-deprivation remedial scheme. *Reich v. Collins,* 513 U.S. 106, 115 S.Ct. 547, 130 L.Ed.2d 254 (1994). After acknowledging the state's flexibility to establish any adequate procedure, this Court concluded:

> A State is free as well to reconfigure its remedial scheme over time, to fit its changing needs. Such choices are generally a matter only of state law.
>
> But what a State may *not* do, and what Georgia did here, is to reconfigure its scheme, unfairly, in *mid-course* – to "bait and switch," as some have described it.

513 U.S. at 111, 115 S.Ct. at 550, 130 L.Ed.2d at 459 (emphasis the Court's).

Although the particular circumstances of this case do not appear to have been considered by this Court before, the California courts here have engaged in a similar violation of petitioner's due process rights through a *de facto* "bait and switch." State law indisputably provides a "clear and certain" remedy for an appellate court's determination to decide a case on an issue that had not been proposed or briefed by the parties. That remedy was a mandatory rehearing. *Adoption of Alexander S.,* 44 Cal.3d 857 (1988). Yet there is no effective remedy for violation, unless the offending court volunteers to correct its own error.

Like the petitioner in *Reich,* the petitioner here was correct in formulating his appellate strategy in reliance on the availability of that remedy. However, when the remedy required by statute was not forthcoming, for whatever reason, petitioner was left with no effective remedy for the initial due process violation. The state supreme court compounded the affront to due process by declining review.

Providing an illusory remedy can be no better from a constitutional point of view than changing the rules after the process has begun to pull the rug out from an injured party's feet, or than providing no remedy at all.

A. Petitioner Had No Notice That The 1995 Summary Judgment Rulings Might Be Considered On Appeal

Many jurisdictions have responded to increasing volumes of litigation by establishing laws and rules designed to narrow the scope of disputes to the issues that truly need judicial resolution and to focus the parties' briefing and arguments on issues actually in dispute. The combined effects of several such rules meant not only that petitioner should not have been required to discuss the propriety of the 1995 Rulings in its appellate briefs, but also that petitioner was entitled to rely on their validity.

1. Respondents did not challenge the 1995 Rulings

The record is clear that respondents did not propose or brief the issues that ultimately formed the basis of the appellate decision to reverse. Specifically:

(a) Respondents' Statement of Appealability and statement of the rulings from which they were appealing (AOB at 20) said nothing about the 1995 Rulings.

(b) Respondents did not include the transcript of any summary judgment hearing in the record on their appeal. CT 2342-2346.

(c) Respondents did not brief or argue the standard of review applicable to an appeal from a summary judgment ruling.

(d) Respondents did not brief or argue the evidence before the Superior Court when it made the 1995 Rulings.

(e) Respondents' observation, in their Reply Brief to the Court of Appeal, that they **could** have appealed from the 1995 Rulings (ARB at 4), still did not offer any analysis of **why** the 1995 Rulings should be reversed, and implicitly admitted that they had not raised the issue.

2. Failure to raise an issue on appeal waives the issue

In deciding which issues to discuss in his own appellate brief, Petitioner should have been able to rely on respondents' failure to raise the issue as demonstrating, at least initially, that he did not need to defend the 1995 Rulings in his own appellate brief. As this Court held more than a century ago, "matters of error may always be waived, and they are waived when the attention of the reviewing court is not called to them." *Montana Railway Company v. Warren,* 137 U.S. 348, 351 (1890). This is not an ancient technical rule since discarded (*see, e.g., Graham v. Long Island R.R.*, 230 F.3d 34, 41 [2d Cir. 2000]), but is fundamental to protection of the due process rights of the party who prevailed below.

California agrees that a non-jurisdictional error must be asserted to avoid waiver. *Klauber v. San Diego Streetcar Co.,* 98 Cal. 105, 108, 32 P. 876, 877 (1893). In California, "every brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration." *People v. Stanley,* 10 Cal.4th 764, 793 (1995).

> Not only must an appellant raise the point in his brief properly but he must point out the error specifically showing accurately wherein the lower court's action is deemed erroneous. . . . Therefore having failed to sustain the burden cast upon

> him of pointing out any error in the decisions of the trial court\the judgment must be affirmed.

Richard v. Richard, 123 Cal.App.2d 900, 903 (1954).

Indeed, Rule 14(a)(2) of the California Rules of Court provides that, "An appellant's opening brief **must** . . . (A) state the nature of the action, the relief sought in the trial court, and the judgment or order appealed from." (Emphasis added.) Subdivision (a)(1) of Rule 14 requires every appellate brief to:

> (B) state each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority; and
>
> (C) support any reference to a matter in the record by a citation to the record.

California courts have long recognized that mentioning an issue for the first time in a reply brief is too late:

> The obvious reason for this rule is that opposing counsel is not afforded an opportunity of answering the contentions of the appellant or of assisting the Court of Appeal by furnishing it with the benefit of research, and in the case of questioned findings of fact, references to the record where evidence might be found in support of such findings.

Richard v. Richard, 123 Cal.App.2d 900, 903 (1954).

In the legal environment defined by such constitutional imperatives, statutes and rules, petitioner not only should not have needed to defend the 1995 Rulings; he would have been quite unwise to devote so much of his appellate brief to unraised issues that he could not adequately have dealt with the issues that had actually been proposed and briefed by respondents.

3. An order denying summary judgment is unappealable after a trial on the merits

In deciding which issues to discuss in his own appellate brief, Petitioner should also have been able to rely on the fact that the order denying respondents' summary judgment motion was not appealable. Although some jurisdictions, including California, allow some process for immediate appellate scrutiny of an order denying summary judgment in some circumstances, such orders are normally mooted when a case actually goes to trial. As this Court once put it, "denial of a motion for summary judgment because of unresolved issues of fact . . . decides only one thing – that the case should go to trial." *Switzerland Ass'n v. Horne's Market,* 385 U.S. 23, 25 (1966).[6]

California also considers the denial of a summary judgment ruling to be nonappealable. *Wilson v. Wilson,* 54 Cal.2d 264, 265 (1960); *Shelter Creek Dev't Corp. v. City of Oxnard,* 34 Cal. 3d 733, 737, 669 P.2d 948, 949, 195 Cal. Rptr. 361, 362 (1983).

Most of the states that have considered the question have found it improper to review a summary judgment motion that was denied on the basis of disputed facts after a full trial on the merits of the disputed issues.[7] Indeed,

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[6] Not surprisingly, almost every federal Circuit Court of Appeals has agreed.

[7] *E.g., Mitchell v. Folmar & Assocs.,* 854 So.2d 1115, 1116 (Ala. 2003); *Fleitz v. Van Westrienen,* 114 Ariz. 246, 248, 560 P.2d 430, 432 (1977); *Amer. Physicians Ins. Co. v. Hruska,* 244 Ark. 1176, 1179-1180 (1968); *Cook v. Huff,* 274 Ga. 186, 189 (Ga. 2001); *Leavitt v. Swain,* 133 Idaho 624, 631, 991 P.2d 349, 356 (1999); *Estate of Galluzzo,* 615 A.2d 236, 238 (Me. 1992); *Deerskin Trading Post, Inc. v. Spencer Press, Inc.,* 398 Mass. 118, 126, 495 N.E.2d 303, 308-309 (1986); *McLain v. Ortmeier,* 259 Neb. 750, 753, 612 N.W.2d 217, 221 (2000); *Harris v. Walden,* 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985); *Myers v. Mo. Pac. RR Co.,* 2002 OK 60, *39, 52 P.3d 1014, 1034 (2002); *Winbun v. Moore,* 143

(Continued on following page)

most do so explicitly on the ground of fundamental fairness or due process.[8]

Analyzing the issue purely on the basis of fundamental fairness, free of any controlling statutory or case authority, an appellate court in Illinois framed the central question this way in 1962:

> To deny a review seems to be unjust. But to grant it would necessarily result, under our first assumption, in the finding that the judgment entered upon the verdict should be set aside and that judgment should be awarded upon one of the motions. This would be unjust to the party that was victorious at the trial, which won judgment after the evidence was more completely presented, where cross-examination played its part and where witnesses were seen and appraised.
>
> The greater injustice would be to the party which would be deprived of the jury verdict. Otherwise, a decision based on less evidence would prevail over a verdict reached on more evidence and judgment would be taken away from the victor and given to the loser despite the victor having the greater weight of evidence. This would

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Wash.2d 206, 213, 18 P.3d 576, 579 (2001); *Cargill, Inc. v. Mountain Cement Co.*, 891 P.2d 57, 61 (Wyo. 1995).

[8] *E.g., Feiger, Collison & Killmer v. Jones*, 926 P.2d 1244, 1247-1248 (Colo. 1996); *Gurliacci v. Mayer*, 218 Conn. 531, 541, 590 A.2d 914, 921 (1991); *Bell v. Harmon*, 284 S.W.2d 812, 814 (Ky. 1955); *Bigney v. Blanchard*, 430 A.2d 839, 841-843 (Me. 1981); *Metropolitan Mtg. Fund v. Basiliko*, 288 Md. 25, 415 A.2d 582 (1980); *Continental Ins. Co. v. Whittington*, 71 Ohio St. 3d 150, 156-157, 642 N.E.2d 615, 619-629 (Ohio 1994); *Payless Drug Stores Northwest v. Brown*, 300 Ore. 243, 245-246, 708 P.2d 1143, 1144 (1985); *Holloman v. McAllister*, 289 S.C. 183, 185-186, 345 S.E.2d 728, 729 (1986); *Ackermann v. Vordenbaum*, 403 S.W.2d 362, 364-365, 9 Tex. Sup. J. 428 (Tex. 1966).

> defeat the fundamental purpose of judicial inquiry.

Home Indemnity Co. v. Reynolds & Co., 38 Ill. App. 2d 358, 366, 187 N.E.2d 274, 278 (1962).

Maryland's Court of Appeals agreed in 1980, observing that to "turn the tables in this manner would be nothing short of substituting a known unjust result for a known just one." *Metropolitan Mtg. Fund v. Basiliko,* 288 Md. 25, 29, 415 A.2d 582, 584 (1980). Not long after, Maine's highest court called a post-trial reversal of an order denying summary judgment an "absurd result" because it would "defeat the fundamental purpose of the particular judicial procedure and deprive a party of a fair trial to which he is entitled." *Bigney v. Blanchard,* 430 A.2d 839, 842-843 (Me. 1981).

The only state whose supreme court has considered the issue and explicitly disagreed seems to be Montana, whose rules provide that all "non-appealable intermediate orders or decisions properly excepted or objected to which involve the merits or necessarily affect the judgment are reviewable from a final judgment. *Brown v. Midland Nat'l Bank,* 150 Mont. 422, 428-429, 435 P.2d 878, 881-882 (1967). The highest courts of other states do not yet appear to have decided this issue squarely.[9]

Therefore, petitioner had no reason to anticipate that the Court of Appeal might even consider the 1995 Rulings.

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[9] This case, therefore, presents an opportunity for this Court to resolve the issue by decreeing that factual scrutiny on a lesser record cannot be better than factual scrutiny on a fuller record, at least in a state that has not specifically and unambiguously approved such a process.

B. The Lack of Remedy Outside This Court Further Violates Petitioner's Due Process Rights

The California Supreme Court is permitted by rule to grant review in only very limited circumstances. Violation of a party's federal constitutional rights by an appellate court is not among them:

> The Supreme Court may order review of a Court of Appeal decision:
>
> (1) when necessary to secure uniformity of decision or to settle an important question of law;
>
> (2) when the Court of Appeal lacked jurisdiction;
>
> (3) when the Court of Appeal decision lacked the concurrence of sufficient qualified justices; or
>
> (4) for the purpose of transferring the matter to the Court of Appeal for such proceedings as the Supreme Court may order.

California Rules of Court, Rule 28(b).

Thus, on a fundamental level, California's court structure is such that any person deprived of notice and an opportunity to be heard, in violation of § 68081 of the Government Code, is dependent entirely on the whim of the very appellate court that violated the statute to provide the only available remedy.

Where a litigant has raised constitutional issues, "it was the province and duty of the state courts to decide them." *Rooker v. Fidelity Trust Co.,* 263 U.S. 413, 415 (1923). A state court may not deny a federal right in the absence of a "valid excuse" because the "existence of the jurisdiction creates an implication of duty to exercise it." *Howlett v. Rose,* 496 U.S. 356, 369-370 (1990). As this Court said in *Kenney v. Supreme Lodge of the World, LOM,* 252 U.S. 411, 415 (1920), "it is plain that a State cannot escape its constitutional obligations by the simple device of

denying jurisdiction in such cases to Courts otherwise competent."

Such violations of federal constitutional rights, unremedied by the state courts, are the traditional stuff of this Court's appellate jurisdiction. *Angel v. Bullington,* 330 U.S. 183, 188-189, 67 S.Ct. 657, 660-661, 91 L.Ed. 832, 836-837 (1947). Where jurisdictional rules are relied on by the courts as a ground for declining to consider constitutional claims properly before them, in apparent violation of a legislative command, it is left to this Court to enforce constitutional requirements. *Cf. Bush v. Gore,* 531 U.S. 98, 115, 121 S.Ct. 525, 535, 148 L.Ed.2d 388, 405 (2000) (Rehnquist, C.J., concurring).

Because California does not provide any meaningful avenue for review of a § 68081 violation, and its courts refused even to consider the issues when raised by petitioner, the intervention of this Court is appropriate. Without it, due process rights in California are unenforceable.

II. THE COURT OF APPEAL'S RE-EXAMINATION OF FACTS, IN A MANNER CONTRARY TO COMMON LAW, VIOLATED PETITIONER'S RIGHT TO TRIAL BY JURY

The Seventh Amendment provides that, "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." This Court determined long ago that "any Court of the United States" includes not only the federal courts but the state courts as well:

> It is clear that the last clause of the seventh amendment is not restricted in its application to suits at common law tried before juries in the courts of the United States. It applies equally to a case tried before a jury in a state court, and

> brought here by writ of error from the highest court of the state.

Chicago, B. & Q. R. Co. v. City of Chicago, 166 U.S. 226, 242-243 (1897).

A. Respondents Waived Sufficiency-of-Evidence, Too

Respondents waived any argument that the judgment was not supported by substantial evidence because, although they did argue that issue, the "facts" stated and the inferences drawn in their appellate briefs were those most favorable to themselves, rather than those supporting the judgment. Respondents made no attempt to fairly state all of the evidence, as is required by California law.

In California, the knowing failure of an appellant to cite to evidence that supports the verdict waives the right to challenge the sufficiency of the evidence. *Oliver v. Board of Trustees*, 181 Cal. App. 3d 824, 832, 227 Cal. Rptr. 1, 6 (1986). Respondents rarely even mentioned evidence favorable to petitioner. Respondents generally ignored evidence conflicting with their own position, and drew only inferences favorable to themselves. "Given this type of presentation the contention that the findings are not supported by substantial evidence may be deemed waived." *Id.* Apparently, the Court of Appeal relied on respondents' obligation to present the record fairly, and was thereby led astray.

B. Evidence Supporting The Judgment For Petitioner

That there was sufficient evidence to support the jury's verdict can be shown easily:

- none of the respondents told petitioner anything about their secret partnership distributions in 1988 (CT 722:15-20, CT 1815-1820)

(the Court of Appeal did not mention this undisputed evidence, and apparently did not consider it);

- soon after the thefts, respondent Kurtzman gave petitioner a document falsely showing that no distributions had been made and assured petitioner that he would get his share when the others did (Exh. 8; RT 894:19-895:20) (the Court of Appeal did not mention this undisputed evidence, and apparently did not consider it);
- several weeks after completion of the private placement from which petitioner was expecting to get shares issued to him as a partnership distribution, petitioner was advised by Aura's securities counsel that the 40,000 shares he had been expecting were indeed his, and that he should so report to the S.E.C. even though certificates had not been issued (RT 517:6-23) (the Court of Appeal did mention this undisputed evidence [App. 7], but – knowing from hindsight that the attorney's advice was wrong, apparently considered it as a communication that should have aroused suspicion); and
- respondents claimed that the shares were for payment of deferred compensation due to them, and not a partnership distribution at all (CT 322:2-4, 336:12-20) (the Court of Appeal did not mention this undisputed evidence, and apparently did not consider it).

There was no evidence at trial suggesting that there was any way petitioner could have learned about respondents' wrongful conduct any sooner than he actually did. Petitioner did not have actual notice, or even any reason to suspect, that there was any information in S.E.C. filings pertinent to partnership distributions, and he could not

have learned about respondents' theft of his share of the distribution even if he had inquired.

C. Evidence Cited By The Court Of Appeal As A Basis For Deciding In Favor Of Respondents

Disregarding all the evidence in favor of the judgment, the Court of Appeal chided the jury for having "rejected uncontroverted evidence susceptible to only one legitimate inference showing [petitioner] had constructive notice of his claims not later the spring of 1989." App. 16. The evidence supposedly rejected by the jury consisted of only a single fact: that some documents filed by Aura with the S.E.C. as early as 1989 – indisputably not sent to petitioner – had mentioned that respondents had each been issued 48,000 shares of stock in connection with the private placement in 1988.

From that fact, the Court of Appeal inferred that, **if** petitioner had gone to the S.E.C. (before such documents were made available on line) and read those documents, he would eventually have "unearthed information" that the respondents "had each received 48,000 shares from the private placement and thus, in essence had divided [petitioner's] partnership shares amongst themselves." App. 18. Surprisingly, the Court of Appeal concluded not only that this inference might have been drawn, but also that no reasonable juror could have drawn any other inference.

The jury did not "reject" evidence of Aura's S.E.C. filings; it just was not persuaded, after seeing the documents and hearing the witnesses, that petitioner's failure to discover the theft had been unreasonable in the circumstances.

D. The Court Of Appeal's Inferences Are Circular

Inferences "must be based on logic and reason. A reasonable inference may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. A finding of fact must be an inference drawn from evidence rather than a mere speculation as to probabilities without evidence." *Roddenberry v. Roddenberry*, 44 Cal. App. 4th 634, 651 (1996).

The Court of Appeal's analysis of the evidence is circular: petitioner should have been suspicious that respondents had stolen from him because he should have read Aura's S.E.C. filings because he was suspicious that respondents had stolen from him. It is undisputed, however, that petitioner had no reason to suspect that his friends and partners had stolen from him before actually reading Aura's S.E.C. filings, and that he had no reason to read them before his suspicions were actually aroused by information that was not to be found in any publicly available document.

The inference drawn by the Court of Appeal was speculation or conjecture, at best. Even if plausible, it would not justify discarding the jury's verdict. In fact, the inferences drawn by the Court of Appeal in this case simply cannot stand up against the evidence that the jury and trial court found persuasive, for several reasons.

1. It is undisputed that petitioner had not seen the documents on file with the S.E.C.

There is no evidence that petitioner read any document filed by Aura with the S.E.C. between 1988 and 1992.

To the contrary, there is undisputed evidence that he did not, and there is a reasonable explanation for his

failure to do so. RT 540:22-541:25. The evidence showed that petitioner had warned respondent Kurtzman and others at Aura that, as the management of a publicly traded company, they had to be more careful to ensure the accuracy of their public statements about the company, and that petitioner's inability to persuade the others to exercise appropriate care in their public statements led him to resign from Aura's board of directors in January 1989 to avoid exposure to the shareholder litigation that would inevitably follow public misstatements. RT 409:18-410:5.

Moreover, there was, in 1989, absolutely no reason for petitioner to think that any public Aura document might contain any reference to a private investment partnership, even if some of the partners were affiliated with Aura. For petitioner to be held chargeable with want of diligence in failing sooner to discover the contents of such documents, he must have been under a duty to make the discovery. "To impute notice, the circumstances must be such that inquiry becomes a duty, and failure to make it is a negligent omission of duty." *Baker v. Beech Aircraft Co.* 39 Cal. App. 3d 315, 321 (1974). Petitioner cannot have been under any such duty.

As long as petitioner had no knowledge, and no way of learning, that respondents had secretly taken partnership distributions, petitioner did not even have any knowledge that he had been injured. Without knowledge of injury, he cannot have had any duty to investigate the source or cause of the injury.

Nonetheless, the Court of Appeal simply declared, as if a matter of law, that petitioner had a duty to read everything filed by Aura with the S.E.C. Apparently, the Court of Appeal just assumed that information pertinent to the partnership was likely to appear in such documents just because the partnership had invested in Aura stock.

This case is not about Aura. There is no evidence suggesting that the persons responsible for preparing Aura's filings even knew anything about the partnership, or that petitioner ever had any other reason to believe any information pertinent to the partnership would ever appear in Aura filings. This assumption by the Court of Appeal was not supported by **any** evidence.

In light of petitioner's quite reasonable, and correct, belief that he could not rely on Aura's S.E.C. filings to provide accurate information even about Aura itself, it was proper for the jury to conclude that he acted reasonably in not bothering to track them down and read them. As long as petitioner had sound reasons not to examine Aura's filings, and no particular reason to expect to find anything relating to the partnership in them, it was reasonable for him not to read them and proper for the jury not to charge him with knowledge of their contents. By decreeing its own view of the matter without regard to the substantial evidence supporting the jury's verdict, the Court of Appeal improperly deprived petitioner of his right to trial by jury.

2. Even reading Aura's S.E.C. filings would not reasonably have caused petitioner to suspect that his partners had stolen from him

The evidence showed that, notwithstanding a lack of confidence that respondents would run Aura in a manner appropriate to a publicly traded corporation, petitioner still had no reason even to suspect that his friends and partners would steal from him. RT 422:13-423:23. On November 1, 1988, after Kurtzman had showed him Exhibit 8 and assured him that earlier disputes were all a misunderstanding (RT 894:8-23), petitioner paid what remained due on a personal debt to Kurtzman (CT 490:1-28), and Kurtzman had Aura issue a check to petitioner in

partial payment of Aura's debt to him. RT 487:18-488:26. All seemed to be well at that time. RT 510:26-511:2. The Court of Appeal did not mention this undisputed evidence, and apparently did not consider it.

Even to consider the possibility that the 48,000 shares issued to each of the respondents might have included a partnership distribution due to petitioner would have meant suspecting a conspiracy among all five respondents, with the complicity of Aura's S.E.C. counsel and Aura's Chief Accounting Officer – which in itself would have been a reasonable basis for *not* being suspicious: "The nature of the relationship is such as to cause the plaintiff to rely on the fiduciary, and awareness of facts that would ordinarily call for investigation does not excite suspicion under these special circumstances." *Lee v. Escrow Consultants, Inc.* 210 Cal.App.3d 915, 921 (1989).

3. Even if petitioner had inquired, any possible suspicions would have been allayed by respondents' apparently reasonable explanations that the stock issued to respondents was for deferred compensation, known to be due to them, and not a partnership distribution at all

If petitioner had seen Aura's S.E.C. filings, and studied them despite knowing them to be unreliable, he would have learned only that Aura had issued $60,000 worth of its stock to each of the respondents, each of whom was known to be owed more than that by Aura for deferred compensation or other debts. The documents Aura filed with the S.E.C. said nothing about the nature of the debt that Aura was paying by issuing stock to five of its officers.

Respondents claimed that the issuance to each of them of $60,000 worth of Aura stock in October 1988 had been "in partial *payment* of *deferred salary* for their

employment in the day to day operations of Aura since its inception." CT 336:12-20 (emphasis respondents').

Knowledge that Aura had paid some of its debts to respondents might have prompted petitioner to wonder why Aura had not also paid what had been due to him.[10] That might have prompted petitioner to sue Aura to collect the deferred compensation due to him. As it was, by the time petitioner did actually learn about the payments to respondents in late 1992, he was already engaged in litigation against Aura for amounts due to him independent of this partnership. It is reasonable to infer that, when he learned through discovery that respondents had arranged for a distribution of partnership profits and then stolen his share, petitioner consulted and followed the advice of the attorney who was handling that litigation.[11]

Petitioner cannot, however, have been put on inquiry notice of his claims against his partners before discovering the truth in non-public Aura documents in 1992, because any inquiries about the stock issued to respondents before then would only have satisfied him that no partnership

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[10] Or it might not have; Aura was still losing money, and was still obliged to seek outside financing, so it would have been entirely reasonable to assume that Aura had decided to defer payment of debts to outsiders even while making partial payments to its current management to encourage them to continue working.

[11] The Court of Appeal's conclusion, as if a matter of law, that any reasonable person would have known that the statute of limitation had started running in early 1989, and would elapse within a few months of the late 1992 discovery, seems necessarily to imply that petitioner's then-attorney committed malpractice by not immediately filing an appropriate claim for a partnership accounting. As the attorney handling Frankston's claim against Aura in late 1992 is now the presiding justice of the appellate division assigned this case, it would seem appropriate for any remand to be referred to a different division of that court.

distributions had been made, as the 48,000-share issuances had all been for deferred compensation. If there were no partnership distributions to the other partners, there was no injury. Because inquiries would not have led to knowledge that any partnership distribution had been made to respondents, petitioner would not even have learned that he had been injured, and still could not have been on notice of his claims.

No one other than respondents knew, and no publicly available document showed, that respondents' "deferred compensation" claim was a fraud. Petitioner could not possibly have known that the 48,000-share issuances were actually distributions of partnership profits, without access to private documents to which he could not have gained access without litigation, including:

- Aura's shareholder records (produced by Aura in other litigation), Exh. P-38;
- Aura's accountant's ledgers (produced by Aura in other litigation), Exhs. P-17 and P-18;
- Respondents' correspondence with Aura's transfer agent arranging the theft (produced by the transfer agent in other litigation), Exhs. P-21 and P-22; and
- bank records showing the conversion of checks representing petitioner's cash share of the profit distribution (produced by Aura's bank), Exhs. P-23, P-24, P-25, P-27, P-28, P-30.

None of these documents was produced by respondents in discovery in this case. The jury and trial court could reasonably conclude that none would have been turned over to petitioner voluntarily, even if he had known to ask, especially as the jury found that three of the respondents had intentionally concealed or suppressed that fact from him. CT 1817:1-18.

Therefore, even actual knowledge of the issuance of stock to respondents in October 1988 could not have put petitioner on inquiry notice of his claims. By substituting its own view of the appellate record for the jury's verdict, the Court of Appeal stepped beyond the bounds established by the Seventh Amendment's proscription of re-examination of facts. "Where the trial court or jury has drawn reasonable inferences from the evidence, [the Court of Appeal has] no power to draw different inferences, even though different inferences may also be reasonable." *Rosales v. Thermex-Thermatron, Inc.*, 67 Cal. App. 4th 187, 197 (1998).

In this case, the inferences drawn by the Court of Appeal were not even reasonable.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Filed 9/22/03 Frankston v. Glen [sic] CA2/7

**NOT TO BE PUBLISHED
IN THE OFFICIAL REPORTS**

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MICHAEL J. FRANKSTON

Plaintiff, Respondent
and Cross-Appellant,

v.

PATRICK GLEN [sic], et al.,

Defendants, Appellants
and Cross-Respondents.

B145777

(Los Angeles County
Super. Ct. No. BC107852)

APPEALS from a judgment and order of the Superior Court of Los Angeles County. Alexander Williams, Judge. Judgment on the appeal is reversed and remanded; the cross-appeal is dismissed.

Greines, Martin, Stein & Richlin, Irving H. Greines and Marc J. Poster for Defendants, Appellants and Cross-Respondents.

Gambrell & Stolz and Joshua Tropper for Plaintiff, Respondent and Cross-Appellant.

Patrick K. Glenn, Neal Kaufman, Cipora Kurtzman, Harry Kurtzman and Arthur Schwartz ("Appellants")

appeal: (1) the judgment upon the jury's verdict in favor of Michael Frankston on his conversion, fraud and breach of fiduciary duty claims; (2) the court's order granting Frankston's motion for summary adjudication on Frankston's partnership accounting claim; and (3) the post-judgment order awarding Frankston attorney's fees. Appellants argue, among other things, they were entitled to judgment because Frankston's causes of action are all barred by the three or four year statute of limitations governing his claims. Although Frankston filed his complaint in June of 1994, Appellants assert Frankston was on inquiry notice of his conversion, fraud and fiduciary duty claims no later than the spring of 1989. With respect to the accounting claim, Appellants contend Frankston's partnership with Appellants dissolved in the spring of 1989 and thus the accounting claim is also untimely. For the reasons discussed herein, we agree and therefore, reverse and remand.

On the cross-appeal, Frankston challenges the post-judgment award of costs. He claims the trial court erred in failing to award the costs of the accounting (including the legal and accounting fees) as a proper part of the winding up of the partnership. In view of the reversal on the appeal, the cross-appeal is dismissed as moot.

FACTUAL AND PROCEDURAL HISTORY[1]

Background of the Partnership. Frankston, a stock market investor and engineer met the Appellants in

[1] Although the appeal and cross-appeal raise multiple issues and involve a complex factual history, only those facts directly relevant to the dispositive issue are described in detail.

the early 1980s. Appellant Harry Kurtzman sold Frankston and the other Appellants approximately 100,000 shares each of restricted stock in a small, privately held defense industry firm, Innovative Information Systems (IIS), which Kurtzman controlled. Appellants and Frankston each spent approximately $6,000 for their shares of IIS stock.

In early 1987, Kurtzman told Frankston and the other Appellants about Anchor Growth (Anchor), a shell company that had no actual business, but had completed the required legal formalities to allow for public trading of its stock. Kurtzman planned a merger of IIS's parent company and Anchor. Prior to the merger, Anchor had approximately 800,000 "freely-traded" shares. Kurtzman proposed he, the other Appellants and Frankston obtain as much of the free-trading Anchor shares as possible so the people associated with IIS could control the new post-merger company and would gain a greater profit from any post-merger increase in the stock value.

Consequently, Appellants and Frankston formed a partnership to invest in the stock of Anchor. The purpose of the partnership was to buy the pre-merger Anchor stock, to resale [sic] it after the merger when its value increased and to lend the profits from the resale of the stock to the newly formed company (which they would control), with the understanding the new company would repay the partnership when the new company had the means to do so. The Anchor stock, however, could not be purchased in one lump sum. Therefore the individual partners bought small amounts of stock at different times and for different prices. Nonetheless, the partners agreed to divide equally the profits resulting from the partnership. Harry Kurtzman agreed to keep track of the partnership transactions.

Frankston purchased 45,000 freely traded shares of Anchor stock for $19,066 while Appellants purchased over 655,000 shares (collectively "partnership stock"). Thereafter in 1987, the merger was completed and the new company, Aura Systems, Inc. ("Aura") was formed. All of the pre-merger IIS and Anchor stock became Aura stock. The Appellants and Frankston assumed leadership positions in Aura. In addition to being an individual stockholder of Aura, Frankston served on Aura's board of directors.

As predicted the value of the partnership stock increased. Pursuant to their agreement in early 1988, Frankston and Appellants began selling their partnership stock and lending 65 to 75 percent of the profits to Aura. Frankston sold 30,000 shares (of the 45,000 he bought for the partnership) in April 1988 and lent Aura $25,000 of the proceeds. The Appellants collectively sold approximately 551,500 shares and lent a total of $471,583 to Aura.

Aura Stock and Cash Distribution Promised to Frankston As His Share of the Partnership Profits.

In the summer of 1988, Frankston learned Aura planned a $5 million private placement of four million new shares of Aura stock to a group of investors to raise money for the company. Kurtzman informed Frankston Aura would repay approximately $300,000 worth of partnership loans through the issuance of 240,000 shares of new restricted Aura stock in connection with the private placement, and thus, each partner would receive 40,000 shares of stock from this transaction (known hereafter as the "Partnership Debt Shares"). Frankston understood the issuance of the new stock would occur as a part of the private placement. Reducing Aura's debt in this manner

allowed the company to retain funds and help attract outside investors. It was also anticipated the private placement would generate sufficient funds to place Aura on solid financial footing and allow it to repay its debts. According to Frankston, the remaining monies owed the partnership by Aura were not necessarily connected to the private placement. He understood that additional (other than the Partnership Debt Shares) partnership distributions would be paid when Aura had the funds to repay the remaining loans.

In the fall of 1988, Frankston became dissatisfied with the Appellants and the manner in which they were running Aura. He was not informed of several Aura board meetings. Frankston concluded he could not rely upon or trust the Appellants, in particular, Harry Kurtzman, when it came to the matters of business. Frankston felt Kurtzman was more interested in inflating Aura's stock price than in developing the business and building new products. In an October 1988 letter to an Aura employee, Frankston described his partners as dishonest, unreliable, incompetent, disingenuous and greedy. He indicated any further effort to assist Aura would amount to a waste of time. Frankston and Kurtzman also had several heated personal exchanges about the business; at one point Kurtzman told Frankston to leave the premises.

At the end of October 1988, Frankston a resident of Massachusetts, made his last visit to Aura's Los Angeles headquarters. During his visit he packed up his office and met with Kurtzman and several other Appellants to come up with correct figures for how much Aura owed Frankston (on personal loans he made to the company), how much Frankston was owed by the partnership and how much Kurtzman and Frankston owed each other from

other personal dealings. To that end, on November 1, Kurtzman showed Frankston a handwritten document ("Exhibit 8" at trial) purporting to account for and summarize the various non-partnership and partnership transactions. Exhibit 8 showed, among other details, the amount of Anchor stock purchased by each partner on behalf of the partnership, sold and then lent to Aura. According to Exhibit 8, approximately 19,000 shares of partnership stock remained unsold as of November 1, 1988. Of that stock, Frankston held 15,000[2] shares and the other 4,000 was held by appellant Schwartz. Exhibit 8 also showed the partners were to receive Partnership Debt Shares (i.e., the $300,000 worth of stock issued in the private placement and divided equally among the partners) and were also to receive a cash distribution of approximately $27,000 each. At the meeting, Frankston also received a check for approximately $28,990 as partial repayment for other loans he made to Aura.[3]

In December 1988, Frankston continued to sell the remaining 15,000 shares of partnership stock. At no time did Frankston offer to loan the proceeds from the sale to Aura, nor did he seek to divide the proceeds with Appellants. According to Frankston he retained the monies from the sale while he waited for a final accounting; he intended

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[2] By the November 1, 1988, meeting, Frankston had already begun selling off the 15,000 shares of partnership stock.

[3] According to Frankston, Aura owed him personally (as separate from the partnership) more than $78,000. Aura was to repay him through a combination of the $28,000 check and a promise of $50,000 worth of new Aura shares (approximately 40,000 shares) ("Personal Debt Shares").

to keep the monies as an offset against the amounts owed him by the partnership.

Also in December, Frankston had a telephone conversation with an Aura company lawyer in which they discussed the private placement and the Partnership Debt Shares. Frankston was informed the private placement would be done "soon." At that point Frankston was already expecting to receive his portion of the Partnership Debt Shares and thus, Frankston disclosed his ownership of the shares on his SEC schedule 13-D filing. In January 1989, Frankston resigned from Aura's board and "washed his hands" of the business side of the company.

The Private Placement

In late 1989, Aura began issuing news releases to announce the completion of the private placement. After the private placement, Aura became listed for trading on NASDAQ. In February 1989, Aura sent to shareholders various documents filed with the SEC including the company's 10Q; Aura's 10K was sent thereafter by mid-1989. Those documents informed shareholders Aura had completed the private placement, had paid off outstanding debts, including loans from officers and directors of the corporation and had $2,034,003 of capital to conduct business. Frankston stated he did not read Aura's annual or quarterly statement because he was not interested in them and assumed they did not contain accurate information.

Also in early 1989, Frankston began selling his non-partnership restricted Aura stock. To do so, he had to file a Rule 144 form with the SEC to have the stock restrictions lifted. These forms indicated Frankston had relied on

Aura's SEC filings in applying to have the restrictions removed.[4]

In March 1989, Frankston sent Aura and several Appellants four letters in which he requested money and stock owed him by Aura and various Appellants. According to Frankston, these letters concerned non-partnership matters (i.e., did not concern the Partnership Debt Shares or any cash distribution) and instead one pertained to personal loans made to Aura by Frankston while others concerned stock of another company. Frankston received no response to his letters.

Aura's SEC S-1 form filed in April of 1989 indicated Appellants each received 48,000 shares of Aura restricted stock from the private placement. Though this document was publicly filed, Frankston was not among the shareholders sent the document.

Frankston never received his Partnership Debt Shares nor did he receive any cash distributions from the partnership.

Litigation

In March 1991, Frankston sued Aura, Kurtzman and others in federal district court seeking to recover damages for Aura's failure to give him the promised Personal Debt

[4] At trial Frankston explained that not withstanding the statements on the Rule 144 form, he did not actually review or rely on Aura's SEC's filings because he expected his stockbroker to have reviewed the materials.

Shares. The jury in the federal case awarded Frankston $61,000 in damages.[5]

In March 1994, Frankston sued Appellant Glenn and another company based on an alleged unauthorized transfer of Aura shares which Frankston had instructed Glenn to hold.[6]

Frankston filed the instant action in late June 1994. In essence he alleged Appellants had taken his Partnership Debt Shares and had failed to pay him his cash share of the partnership distributions. He asserted causes of action for conversion, fraud, breach of fiduciary duty and requested a partnership accounting.

Appellants filed a motion for summary judgment, arguing among various contentions that Frankston's conversion, fraud and breach of fiduciary duty claims (hereinafter the "Tort Actions") were barred by the relevant three and four year statutes of limitation. Appellants argued Frankston was on inquiry notice of all of his claims by mid-1989. They also argued the accounting claim was untimely because partnership dissolved no later than 1989.

Frankston claimed he did not discover Appellants' misconduct until September of 1992 (within the statute of limitations period) when Frankston reviewed internal

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[5] Appellants have always asserted the Personal Debt Shares and the Partnership Debt Shares are one in the same. Thus, Appellants have argued the principles of res judicata apply and preclude Frankston from recovering damages in this action for the injury for which he received a damage award in the federal action.

[6] This action was not yet final at the time the instant case came to trial.

Aura documents which he received in connection with the other litigation.[7] Frankston also filed a motion for summary adjudication on the accounting claim. The trial court denied Appellants' motion and granted Frankston's motion.

Frankston's Tort Actions went to a jury trial. In a special verdict the jury concluded Appellants had converted partnership monies owed to Frankston and the Partnership Debt Shares, had committed fraud and breached their fiduciary duties to him. Specifically with respect to the statute of limitations, the jury adopted Frankston's view that he did not have constructive notice of his claims with respect to the Partnership Debt Shares until September 1992 and did not have constructive notice of his claims for partnership cash distributions until June 1993. The jury awarded Frankston compensatory and punitive damages.

Thereafter the court memorialized its decision on the accounting. Specifically the court found, Frankston did not have constructive notice that he was not going to receive a further partnership accounting (other than Exhibit 8) until September 1992 and that the partnership was not dissolved until Frankston filed the instant complaint in June 1994.

The court entered judgment for Frankston against the Appellants jointly and severally for $646,084 compensatory damages, prejudgment interest of $575,053.50 and $88,193.55 in costs. The court also entered judgment

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[7] These documents apparently showed that in late 1988 Appellants had divided Frankston's 40,000 Partnership Debt Shares and his portion of the partnership cash distribution amongst themselves.

against the individual Appellants for compensatory and punitive damages.

Appellants filed a motion for judgment notwithstanding the verdict and a new trial. In the JNOV, Appellants argued, inter alia, Frankston's claims were barred by the statute of limitations.

The court denied the motions. Thereafter the court granted Frankston's motion for attorney's fees based on Appellants' denial of certain requests for admission. The court, however, denied Frankston's request to recover the costs (including attorney and accounting fees) of the accounting.

Appellants timely appealed the judgment and the post-judgment award of fees. Frankston timely filed a cross-appeal of the post-judgment order denying him the costs of the accounting.[8]

DISCUSSION

The jury found Frankston did not have constructive notice of his Tort Actions (i.e., conversion, fraud and breach of fiduciary duty) with respect to the Partnership Debt Shares until September 1992 and did not have constructive notice of his claims for partnership cash distributions until June 1993. In granting Frankston's motion for summary adjudication and denying Appellants' summary judgment motion on the accounting claim the court concluded the partnership was not dissolved until

[8] This court consolidated the appeals.

Frankston filed the complaint in June 1994.[9] We consider these matters in turn.[10]

A. Tort Actions

The substantial evidence standard of review governs our consideration of the jury's finding on the statutes of limitations governing the Tort Actions.

Standard of Review. In reviewing for sufficiency of the evidence, we give all reasonable inferences in favor of the prevailing party and review the record in the light most favorable to the judgment. (*Cochran v. Rubens* (1996) 42 Cal.App.4th 481, 486.) Nonetheless, the substantial evidence standard of review is not "merely an appellate incantation designed to conjure up an affirmance." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 652.) Substantial evidence is evidence of ponderable legal significance – that is reasonable, credible and of solid

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[9] The court memorialized this finding in its statement of decision on the accounting.

[10] On appeal, Appellants assert other contentions in addition to their statute of limitations argument. Specifically, they claim the judgment should be reversed because: (1) Frankston cannot recover for conversion of intangible stocks and fungible money; (2) Frankston did not present sufficient evidence of damages resulting from fraud or a breach of fiduciary duty; (3) the jury and the court miscalculated the value of the Aura stock at issue and in awarding prejudgment interest; (4) the court made several errors in the accounting by requiring the Appellants to account for more Aura shares than the partnership owned; (5) Appellants were entitled to have a jury decide whether Frankston was seeking to recover for the same shares which were the subject of his federal action; and (6) insufficient evidence supported the post judgment order awarding attorney fees. Our conclusion his claims are barred by the statute of limitations entirely disposes of the appeal, and therefore, we do not reach the merits of the other issues Appellants raised.

value. It does not mean any evidence. A decision supported by a mere scintilla of evidence is not sufficient. Thus, focus is on the quality rather than the quantity of the evidence. (*Id.* at p. 651.) Inferences may amount to substantial evidence, but the inferences must be based on logic and reason. A reasonable inference may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. A finding of fact must be an inference drawn from evidence rather than a mere speculation as to probabilities without evidence. (*Ibid.*)

Moreover, our review requires us to consider the entire record. "The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record." (*Id.* at p. 652.) Reviewing the entire record allows the appellate court to discern whether the trier of fact reasonably believed some evidence while rejecting other evidence. (*Ibid.*) With these principles in mind, we turn our attention to the merits.

Tort Actions Statute of Limitations. On appeal Appellants argue Frankston's Tort Actions are barred by three and four years statute of limitations governing the claims. As set forth below, we agree.

Frankston's causes of action for fraud and conversion are governed by the three-year statute of limitations in Code of Civil Procedure section 338.[11] (§ 338; *Parsons v. Tickner* (1995) 31 Cal.App.4th 1513, 1524-1525.) Frankston's breach of fiduciary duty claim is governed by the four-year catch-all statute of limitations in section 343.

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[11] Statutory references are to the Code of Civil Procedure unless otherwise indicated.

Generally a cause of action accrues when the wrongful act is done and not at the time the plaintiff discovers it. However under the delayed discovery rules, a cause of action will not accrue until the plaintiff discovers or should have discovered, through the exercise of reasonable diligence, all facts essential to the cause of action. (*Prudential Home Mortgage Company, Inc. v. Superior Court (Diaz)* (1998) 66 Cal.App.4th 1236, 1246.) In other words, the statute of limitation runs when the plaintiff suspects or should suspect something is wrong. "'Under this rule constructive and presumed notice are equivalent to knowledge. So, when the plaintiff has notice or information of circumstances to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to his or her investigation (such as public records or corporation books), the statute commences to run.'" (*Parsons v. Tickner, supra,* 31 Cal.App.4th at p. 1525.) "A plaintiff need not be aware of the *specific 'facts'* necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." (*Jolly v. Eli Lilly and Company* (1988) 44 Cal.3d 1103, 1111; italics added.)

The delayed discovery rule is applied to actions involving fiduciary relationships. Where a fiduciary obligation exists, however, facts which would ordinarily require investigation may not incite suspicion and do not give rise to the *usual* duty of inquiry; the duty to investigate *may* arise later because the plaintiff is entitled to rely upon the assumption his or her fiduciary is acting on his or her behalf. (*Eisenbaum v. Western Energy Resources,*

Inc. (1990) 218 Cal.App.3d 314, 324-325.) In any event, once the plaintiff becomes aware of facts, which would make a reasonably prudent person suspicious, the duty to investigate nonetheless arises and the plaintiff may then be charged with the knowledge of facts which would have been discovered by such an investigation. (*Hobbs v. Bateman Eichler, Hill Richards, Inc.* (1985) 164 Cal.App.3d 174, 202.)

Finally, the delayed discovery rules are an exception to the general rule governing the accrual of claims. Consequently, the plaintiff shoulders the burden to establish facts showing he or she was not negligent in failing to make the discovery sooner and he or she had no actual or presumptive knowledge of the facts sufficient to put a reasonable person on inquiry. (*Sun 'N Sand, Inc. v. United Bank of California* (1978) 21 Cal.3d 671, 701-702.)

The evidence presented at trial demonstrated Appellants failed to give Frankston his Partnership Debt Shares and cash distribution, and in fact, divided those assets amongst themselves in the fall of 1988. Thus, here, the inquiry turns on the issue of when Frankston discovered or should have discovered Appellants' misconduct.

Frankston filed his action in June of 1994. Accordingly, at trial Frankston needed to show he was not negligent in failing to discover Appellants' conduct and had no actual or presumption knowledge prior to June of 1991 on the fraud and conversion claims and prior to June of 1990 with respect to the breach of fiduciary duty claim. Frankston testified he first learned of the misconduct in September of 1992 when he reviewed internal Aura documents he received in connection with other litigation. In reaching its verdicts the jury adopted

Frankston's view he did not have notice of his claims with respect to the Partnership Debt Shares until September 1992 and did not have notice of his claims for partnership cash distributions until June 1993.

In our view the jury's conclusion cannot stand. In reaching its conclusion, the jury rejected uncontroverted evidence susceptible to only one legitimate inference showing Frankston had constructive notice of his claims not later [sic] the spring of 1989.

At trial Frankston testified he knew he would receive his Partnership Debt Shares in connection with the private placement. In late 1988, Frankston was expecting his shares because he was told that the private placement would happen soon. He even disclosed he owned them in his SEC 13D filing. The private placement occurred in late 1988. Aura's quarterly report filed with the SEC and sent to shareholders in February 1989, disclosed the private placement had occurred and Aura was solvent. Aura's annual report sent to shareholders in mid-1989 also disclosed the private placement and further noted Aura had repaid nearly all of its debts and possessed significant operating funds. Nonetheless, neither Frankston's Private Placement Shares or any partnership cash distribution were paid to him.

Frankston testified he did not read Aura's 10K and 10Q documents[12] because he was not interested in them

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[12] Neither below nor on appeal does Frankston claim he *did not* receive Aura's 10K and 10Q reports. In contrast, he did present evidence he did not receive Aura's S-1 statement filed in April 1989, which indicated Appellants each received 48,000 shares of Aura restricted stock from the private placement.

and based on his prior experiences with Aura he expected them to be untrustworthy.

In our view a reasonably prudent Aura shareholder would have read the company's annual and quarterly reports. Frankston is charged with the knowledge of facts which would have been discovered had he read them. (See *Turner v. Lundquist* (1967) 377 F.2d 44, 47-48 [investor charged with notice of information contained in company's annual statement and financial statements for the purposes of the statute of limitation].) Moreover, the information contained in the reports about the private placement would have caused a reasonable [sic] prudent person to make additional inquiries and investigation about the Partnership Debt Shares and any other payments Aura made on the loans owed the partnership.

Thus, Frankston's failure to obtain actual notice of Appellants' conduct earlier than 1992 and Frankston's delay in filing suit until 1994 is attributable to Frankston's own negligence, that is, to his failure to review information in company SEC documents readily available to him. (See *Bernson v. Browning-Ferris Industries of California, Inc.* (1994) 7 Cal.4th 926, 936 ["a plaintiff may not disregard reasonably available avenues of inquiry which, if vigorously pursued, might yield the desired information"].)

Had Frankston read these documents, he would have discovered by mid-1989 Aura was claiming the private placement had already occurred – the very event he expected would trigger the issuance of his Partnership Debt Shares. Given that Frankston was expecting but had not yet received his Partnership Debt Shares in early 1989, his discovery from the company reports that the private placement had occurred in late 1988 would have

raised suspicions that something was amiss. Reasonable inquiries following such discovery would have unearthed information, such as the publicly filed Aura S-1 document in which Appellants disclosed they had each received 48,000 shares from the private placement and thus, in essence had divided Frankston's partnership shares amongst themselves.

The party seeking to invoke the delayed discovery rules must show that he or she acted with diligence in protecting his or her rights, i.e., she has not made herself willfully ignorant. Frankston simply could not make such a showing.

Finally, that Appellants owed Frankston a fiduciary obligation does not change the result. The fiduciary relationship allowed Frankston to assume Appellants were acting on his behalf until he had knowledge to the contrary. A review of Aura's annual and quarterly reports and the subsequent inquiries such review would generate would have apprised Frankston Appellants were not acting in his best interest.

In light of the entire record no reasonable trier of fact could have concluded otherwise. To do so would be to isolate and credit only evidence relevant to actual knowledge (in June 1992) while arbitrarily rejecting unrefuted evidence showing constructive notice (by mid-1989).

Consequently, this is that rare case where the jury's verdict is not supported by sufficient evidence. The evidence presented at trial leads to but one legitimate and reasonable conclusion, Frankston had constructive notice of his Tort Actions in the spring of 1989 and thus his June 1994 complaint is untimely. Consequently, the trial court

erred in denying Appellants' motion for a judgment notwithstanding the verdict on the Tort Actions.

B. Accounting Claim

Appellants filed a motion for summary judgment arguing Frankston's partnership accounting claim was barred by the statute of limitations. Frankston opposed the motion, and in fact, filed a motion for summary adjudication of the claim, asserting the cause of action for an accounting was timely because it did not accrue until Frankston filed his lawsuit in June 1994, and thereby effectively dissolved the partnership. In denying Appellants' motion and granting Frankston's motion, the trial court concluded the accounting claim was timely filed.[13]

Standard of Review. Both the granting of summary adjudication judgment motion and the denial of the summary judgment motion are governed by the *de novo* standard of review. This court independently reviews whether there is a genuine issue of material fact and

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[13] Frankston asserts Appellants cannot raise the issue of the timeliness of the accounting claim in this court because Appellants did not appeal the order granting the summary adjudication. However, the order granting the summary adjudication motion was not immediately appealable when entered because it did not dispose of all remaining causes of action. An order granting summary adjudication is properly reviewed after the entry of a final judgment. (*Anmaco v. Bohlken* (1993) 13 Cal.App.4th 891, 897.) In addition, the fact Appellants failed to list the order in their notice of appeal does not preclude our review of the matter. A prior nonappealable order need not be specified in the notice of appeal from a subsequent appealable judgment. (See § 906; *County of Los Angeles v. City of Los Angeles* (1999) 76 Cal.App.4th 1025, 1028). Thus, we conclude this issue is properly before us.

whether the moving party is entitled to judgment as a matter of law. (§ 437c, subd. (c); *Union Bank v. Superior Court.* (1995) 31 Cal.App.4th 573, 579.) This court applies the same standards as did the trial court. Review of the trial court's determination requires reassessment of the legal significance of the documents upon which the trial court acted. (*Hulett v. Farmers Insurance Exchange* (1992) 10 Cal.App.4th 1051, 1058.)

In conducting our review, we are limited to the facts shown by the evidentiary materials (i.e., declarations and deposition testimony) submitted, as well as those facts admitted or uncontested in the pleadings, and moving and opposing papers. (*Sacks v. FSR Brokerage, Inc.* (1992) 7 Cal.App.4th 950, 962.) The evidence presented by the moving party is strictly construed and that of the opposing party is liberally construed; the facts alleged in the evidence of the opposing party and the reasonable inferences therefrom must be accepted as true. (*Savage v. Pacific Gas and Electric Co.* (1993) 21 Cal.App.4th 434, 440.)

We affirm an order granting summary adjudication where the papers and pleadings show there is no triable issue of material fact in the action, (i.e., where the evidence demonstrates the claims of the opposing party are entirely without merit on any legal theory) thereby entitling the moving party to judgment as a matter of law. (§ 437c, subd. (c); see *Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 35-36.) These principles are informative of our consideration of the issues relating to the accounting claim.

Accounting Claim Statute of Limitations. The four-year catchall statute of limitations in section 343 governs a claim seeking an accounting from a partnership.

(*Manok v. Fishman* (1973) 31 Cal.App.3d 208, 213; *Peebles v. R.G. Garland Corp.* (1972) 27 Cal.App.3d 163, 166.)

Under the former[14] Corporation Code section 15043, the right to an accounting accrues to a partner against his or her other partners at the date of dissolution of the partnership absent an agreement to the contrary.[15] Former Corporations Code section 15029 defined dissolution as "the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from winding up of the business." Pursuant to former Corporations Code section 15031, a partnership is dissolved by various means including the termination of the particular undertaking of the partnership agreement. In other words, a partnership ends, a cause of action for a partnership accounting accrues and the statute of limitations begins to run when the business of the partnership is substantially complete or where the purpose of the partnership is accomplished. (See *Wrightson v. Dougherty* (1936) 5 Cal.2d 257, 261; *San Francisco Iron and Metal Company v. American Milling & Industrial Company* (1931) 115 Cal.App. 238, 248.) Moreover, "an abandonment or dissolution of a partnership . . . may take place by

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[14] At the time this partnership was formed in 1987, California partnerships were governed by the Uniform Partnership Act (UPA). In 1996, the Legislature enacted the "Uniform Partnership Act of 1994" which was made to apply to all partnerships entered into after January 1, 1997. This partnership formed prior to that date continues to be governed by the original UPA. Consequently, all references to the Corporations Code herein refer to the former, pre-1997 code or the original UPA.

[15] There is no evidence the partners made any agreement on a date to complete an accounting.

conduct inconsistent with its continuance, in spite of the fact that liquidation is not complete, or that some appearances of partnership continue." (*Middleton v. F.P. Newport* (1936) 6 Cal.2d 57, 62.)

In our view uncontroverted evidence presented below in connection with the motion for summary judgment and motion for summary adjudication leads to but one logical conclusion, that is, Frankston's partnership with Appellants dissolved no later than spring 1989 when the business of the partnership was substantially complete and its purpose accomplished.

Appellants and Frankston formed a partnership to invest in the stock of Anchor. The purpose of the partnership was to buy the pre-merger Anchor stock, to resale [sic] it after the merger when its value increased and to lend the profits from the resale of the stock to Aura with the understanding Aura would repay the partnership when Aura had the means. All of the transactions and events relating to the partnership's business occurred between 1987 and early 1989.

Frankston and Appellants began purchasing pre-merger Anchor freely traded stock in 1987. Also in 1987 Aura was created from the merger of Anchor and IIS's parent company. In 1988, Frankston and Appellants sold almost all of the partnership stock and lent the proceeds to Aura. In late 1988, Aura completed the private placement and began to repay partnership and other debts.

In late 1988, only 19,000 shares of partnership stock were still held by the partners. Of that, Frankston held 15,000 shares, which he sold between late 1988 and early 1989. At no time did Frankston offer to loan the proceeds from that stock sale to Aura, nor did he seek to divide the

proceeds with Appellants. According to Frankston he retained the monies from the sale while he waited for a final accounting; he intended to retain the monies as an offset against the amounts owed him by the partnership. Frankston's conduct with respect to the 15,000 shares is inconsistent with the continuance of the partnership, and instead is consistent with the view the partnership had completed its undertaking and all that remained was the winding up of partnership affairs.

There was simply no evidence the partnership conducted any business (i.e., bought any additional shares or lent any funds to Aura) after early 1989. The fact the partnership still owned 4,000 partnership shares in early 1989 does not, standing alone, prolong the life of the partnership. These assets notwithstanding, by the spring of 1989 the partnership's purpose was accomplished as there was no evidence Aura needed or sought any new loans from the partnership at that point.

In view of the foregoing, we cannot agree with the lower court's finding the partnership existed until Frankston filed this lawsuit in June of 1994. Instead, we conclude the uncontroverted evidence demonstrates the partnership dissolved no later than spring of 1989 and the four-year statute of limitation for the accounting claim ran no later than the spring of 1993. Consequently, the trial court erred in granting summary adjudication on Frankston's accounting claim and erred in failing to grant Appellants' judgment on the claim.

DISPOSITION

The judgment is reversed and remanded with directions to the trial court to (1) grant Appellants' motion for

judgment notwithstanding the verdict; (2) deny respondents' motion for summary adjudication on the accounting claim and grant Appellants' motion for summary adjudication on the accounting claim; and (3) to enter an order denying respondent's post-judgment motion for fees and costs. The cross-appeal is dismissed as moot. Appellants are entitled to costs on appeal.

WOODS, J.

I concur:

MUNOZ (AURELIO), J.*

JOHNSON, J., Dissenting.

I concur with respect to the disposition of the tort causes of action. I respectfully if briefly dissent, however, from the reversal of the trial court's decision denying appellants' summary judgment motion in which the judge rejected their claim the statute of limitations had run on respondent's accounting action. Admittedly, one might reasonably quarrel with the judge's further decision granting respondent summary adjudication on the same issue – finding there was no triable issue but that the limitations period had *not* expired. Yet in my view that is a much closer call than the position the majority opinion accepts – this court's holding there is no triable issue but that the limitations period *had* expired. At a minimum, there is a triable issue whether the statute of limitations

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* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

indeed had run. As a result, at a minimum, I would remand for a full scale trial on that question.

My differences with the majority opinion are not about the applicable law, but with its appraisal of the facts. To begin explaining why summary judgment is inappropriate, recall appellants bear the burden of proof on the statute of limitations issue. In order to earn a summary judgment, they must demonstrate conclusively the statute began running before June 29, 1990. They cannot succeed by withholding testimonial or documentary evidence which might contradict their position and then claim respondent has failed to prove the limitations period commenced later than that date. It is their burden and, especially at the summary judgment stage, a heavy one. And, on appeal of a trial court's denial of summary judgment, it is an even heavier burden. That court's evaluation of appellants' evidence and its conclusion respondent failed to prove conclusively the limitations period had expired before respondent filed his complaint is entitled to great deference.[1]

The majority opinion adopts appellants' position the partnership had terminated more than four years before respondent filed his action because the partnership had a "particular undertaking" and that "undertaking" had been

[1] On the other hand, no such deference is owed to that same judge's decision on respondent's summary adjudication motion. Instead in considering that motion, we must ask whether, construing the evidence and inferences in appellants' favor, there remains a triable issue the limitations period indeed had expired before respondent filed his accounting action. In my view, neither party submitted evidence in support of their cross-motions sufficiently conclusive to avoid a finding the issue remains "triable."

completed. The burden of proof once again falls heavily on respondents. "A partnership once shown to exist is presumed to continue until the contrary is shown, and the burden of proof is upon him who asserts its termination."[2]

Here, at a minimum, a triable issue remains exactly what constituted this partnership's "particular undertaking (or undertakings)" and whether the partnership had completed that "particular undertaking" or those "particular undertakings" by June 1990.

To begin with, it is important to note the partnership formed to take over the shell publicly-traded corporation and merge it with the partners' privately held but operational company was a distinct business entity not absorbed into the merged corporation. Thus, Frankston's resignation from the board of the latter had nothing to do with the continuance of the partnership.

The partnership itself contemplated several "undertakings" beyond the initial purchases of stock in the publicly-traded shell corporation, at least some of which had not been completed as of June 1990 – and probably not as of June 1994. From the beginning, those "undertakings" included not only a pooling and eventual distribution of the stock acquired, but the sale of appreciated stock to defray the "cost" of making those initial purchases. Beyond that, later events evidenced the partnership continued and added further "undertakings" including personal loans to the company as well as use of the partnership stock to support the ongoing operations of the new corporation –

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[2] See, e.g., *Asamen v. Thompson* (1942) 55 Cal.App.2d 661, 668-669.

and especially to rescue it if and when it fell into financial jeopardy. The first time this occurred was in the Spring of 1988 when, at Kurtzman's request, partners including Frankston began selling partnership shares and loaning most of the proceeds to the company with the understanding they would be repaid at a later time. Still later on, the partners agreed to accept additional restricted shares as repayment of the partnership loans they had made to shore up the company.

There is a triable issue, at a minimum, whether all of these "undertakings" had been completed as of June 1992 – or have as yet. Appellants have failed to produce evidence all the partnership shares have been sold, the loans repaid, and all distributions made. On the other hand, there is substantial evidence distributions were *not* made to at least one of the partners – respondent Frankston – which itself was part of the partnership's "undertakings." Nor is there conclusive evidence the partnership did not remain on call to buttress the company if and when it ran into choppy financial waters – through personal loans, partnership loans, the issuance of new stock or whatever – well into the 1990's. In other words, it is far from clear this partnership had the limited "particular undertaking" the majority opinion describes and finds was fulfilled in the late 1980s.

For this reason, I would remand the accounting action to the trial court for a full trial of the statute of limitations issue.[3]

JOHNSON, Acting P.J.

[3] In my view, Frankston also should prevail on his cross-appeal were this court to have affirmed his accounting action. It would be appropriate for this court to reverse the trial court's refusal to allocate the fees and costs of the accounting action among all the partners. The trial court required Frankston to bear all those costs despite the fact the accounting was a partnership function and is considered a benefit to the entire partnership, including those partners who are accused and proven to have violated the partnership agreement. Indeed this division recently decided this very issue in the closely analogous context of a close corporation. (*Cziraki v. Thundercats, Inc.* (Aug. 20, 2003, B159413) ___ Cal.App.4th ___, 2003 Cal.App.Lexis 1286.) In that case, one of only three shareholders won a derivative action accusing the other two shareholders of actions detrimental to the corporation. We reversed the trial court's denial of the successful shareholder's motion requesting the corporation reimburse his litigation fees and costs. We ruled it was irrelevant there were no "passive" shareholders or that the two shareholders who were sued had interests adverse to the successful shareholder or that the plaintiff had also filed and lost individual claims against the other shareholders in the same lawsuit.

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

Date: 10/31/95 **DEPT.** 35
HONORABLE Alexander Williams, III
JUDGE

F. MOREAU DEPUTY CLERK
R. LEE
S. GECO Reporter

BC107852 2:30 pm
MICHAEL J. FRANKSTON — Plaintiff
Counsel JOSHUA TROPPER (X)
(via conference call)

VS
PATRICK J. GLENN, ET AL — Defendant
Counsel
JOHN I. ALIOTO (X)
(via conference call)

NATURE OF PROCEEDINGS:

1. MOTION FOR SUMMARY JUDGMENT BY DEFENDANTS PATRICK K. GLENN; NEAL KAUFMAN; CIPORA KURTZMAN; ZVI (HARRY) KURTZMAN; AND ARTHUR SCHWARTZ;

2. PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION ON CAUSE OF ACTION FOR ACCOUNTING; AND FOR FIFURCATION [sic];

3. PLAINTIFF'S MOTION FOR SANCTIONS;

(Continued from October 30, 1995)

1. Defendant's Motion for Summary Judgment is argued and denied, for the reasons stated on the record as fully

reflected in the notes of the official court reporter, which are incorporated herein by reference, the Court finds triable issues of material fact. Counsel for the plaintiff is to prepare an order and submit to this court within one week.

2. Plaintiff's Motion for Summary Adjudication is argued and granted for the reasons stated on the record as fully reflected in the notes of the official court reporter, which are incorporated herein by reference. The Court finds no triable issues of material fact. Pursuant to the stipulation of counsel accounting will not be assigned to accounting master but the accounting will be done by the Court at time of trial.

Plaintiff's Motion for bifurcation is argued and continued for further hearing at time of Final Status Conference.

IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

MICHAEL J. FRANKSTON, an individual,

Plaintiff,

v.

PATRICK K. GLENN, an individual; NEAL KAUFMAN, an individual; CIPORA KURTZMAN, an individual; ZVI (HARRY) KURTZMAN, an individual; and, ARTHUR SCHWARTZ, an individual,

Defendants.

CASE NO. BC 107852

STATEMENT OF DECISION RE ACCOUNTING

The Court, having received Plaintiff's Proposed Statement of Decision re Accounting, Defendants' Objections to Plaintiff's Proposed Statement of Decision re: Accounting, and Plaintiff's Reply Memorandum re Proposed Statement of Decision re Accounting, and having considered the evidence presented at the trial of the matter and the arguments of counsel, has directed Plaintiff's counsel to prepare this Statement of Decision pursuant to Rule 232(c) of the California Rules of Court, according to the Court's tentative decision announced during telephonic hearing on March 3, 2000.

The Court makes the following findings:

Formation of the partnership

1. In early 1987, plaintiff Michael J. Frankston ("Frankston") and defendants Patrick K. Glenn ("Glenn"), Neal Kaufman ("Kaufman"), Cipora Kurtzman ("C.Kurtzman"), Zvi (Harry) Kurtzman ("Kurtzman") and Arthur J. Schwartz ("Schwartz") entered into a partnership to purchase common stock in a company then known as Anchor Growth Corporation.

2. The parties agreed to hold however much free trading Anchor growth stock that they bought as partnership assets.

3. On or about February 27, 1987, Anchor Growth Corporation changed its name to Aura Systems, Inc. ("Aura").

4. The parties agreed that any partner who sold partnership shares held in his or her own name could reserve 35% of the sale proceeds to cover the tax liability associated with the sales.

5. The parties agreed to an equal distribution of profits, as would be required by law in the absence of a contrary agreement. (Cal. Corps. Code, § 15018(a); *Kovacik v. Reed* (1957) 49 Cal.2d 166, 169.)

6. The parties agreed that $300,000 of the profits would be distributed in the form of 240,000 shares of new Aura stock, 40,000 to each partner. (Stipulated Fact No. 3.)

Purchase and sale of stock as partnership assets

7. All six of the parties, either directly or indirectly, purchased Anchor Growth stock as partnership assets.

8. Each partner's duty to keep an account included a duty to keep accurate records of the dates and amounts of things received and of payments made. (*Kennard v. Glick* (1960) 183 Cal.App.2d 246, 251.) A partner cannot escape liability by failing to produce records or testimony to account for the property chargeable to him or her. (*Larkin v. Jesberg* (1961) 191 Cal.App.2d 272, 277.)

9. A partner who fails to account for partnership transactions, as all the defendants did, "raises a suspicion of infidelity or neglect, creates a presumption against himself, and brings upon himself the burden of accounting to the utmost for all that has come into his hands; and in such case every doubt is to be resolved against" the partner who fails to account. (*Kennard v. Glick* (1960) 183 Cal.App.2d 246, 250-251.)

10. Defendants admitted, in the formal legal documents created for the merger of Aura and AmCan Cyphermaster, Ltd., in early 1988, that "Aura's directors, officers and affiliates" owned 762,882 shares of free-trading Aura stock as of February 29, 1988. (Exhibit P42 at 52.)

11. Frankston offered direct evidence, including canceled checks, transaction records and brokerage account statements, showing the purchase of 45,000 of those 762,882 shares for $19,066 and subsequent sales for $58,793.

12. The five defendants collectively owned the remaining 717,882 free-trading Aura shares. Defendants have not provided sufficient information to determine which defendants had bought how much stock, except that Glenn, Kaufman, C.Kurtzman and Schwartz had

collectively purchased at least 655,500 shares and sold at least 551,500.

Return of capital contributions

13. Each partner was entitled to a return of his or her capital contribution to the partnership, by agreement and by law. (Cal. Corps. Code, § 15018(a).)

14. Four of the defendants (Glenn, Kaufman, C.Kurtzman and Schwartz) sold at least 85,000 shares, recovering the cost of purchasing 655,500 shares from the proceeds of those sales.

15. Plaintiff's contribution was the $19,066 used to pay for his 45,000 shares. That is the sum of the amounts of two checks: (a) Check No. 132, payable to Johnson Bowles, in the amount of $10,311 (Exhibit P1); and (b) Check No. 133, payable to Bagley & Mouser Sec. Inc., in the amount of $8,755 (Exhibit P3). Although a draft preliminary accounting prepared by Kurtzman in late 1988 (Exhibit 8) showed an estimate of $19,000 due to plaintiff as a return of his capital contribution, that amount was not paid to plaintiff.

Distribution of profits from sale of stock

16. Defendants received at least $470,583 in profit from the sale of 551,500 shares in 1988, after reserving 35% for taxes and after repayment of their capital contributions. (Exhibit 8.)

17. Plaintiff received $58,793 from the sale of his 45,000 shares in 1988 ($34,500 from the sale of 30,000 shares, plus $24,293 from the sale of the remaining 15,000

shares). (See Exhibits P6, P7 and P11.) After deducting 35% (or $20,577) to cover taxes, and plaintiff's cost of $19,066, this would leave partnership profits of $19,150.

18. There being no evidence of any other shares having been sold before dissolution of the partnership, the total partnership profits available for distribution should thus have been $489,733. After converting $300,000 of that amount into 240,000 shares of Aura stock to be divided among the partners, each partner's one-sixth share of the remaining $189,733 would have been $31,622.

19. On or about October 20, 1988, 48,000 shares of new Aura stock and $21,930 in partnership profits was distributed to each of the defendants.

20. No profit distribution was made to plaintiff at any time.

Kurtzman's draft preliminary accounting

21. None of the defendants informed plaintiff of the distributions at the time they were made.

22. On or about November 1, 1988, Kurtzman delivered Exhibit 8 to plaintiff, falsely indicating an intent to include plaintiff in any partnership distribution.

23. Plaintiff did not learn of facts that gave him constructive notice that he was not going to receive any further partnership accounting until September 1992.

Unliquidated partnership assets

24. The partnership was dissolved by the filing of this complaint on June 29, 1994.

25. On June 29, 1994, the fair market value of Aura stock was $9.125 per share.

26. Of the 762,882 shares of free-trading Aura stock owned by the six partners in February 1988, plaintiff owned and subsequently sold 45,000. Of the 717,882 shares owned by defendants in February 1988, Exhibit 8 reports the sale of 551,500. That leaves 166,382 shares unsold and not accounted for by defendants. At the dissolution value of $9.125, those 166,382 shares are worth $1,518,236.

27. It is reasonable to assume that defendants' average cost per share of buying that 166,382 shares was at least the average cost of the 655,500 shares that four of them publicly reported paying, or $0.34. (See, *e.g.*, Exhibit P42 at 48.) Defendants are therefore entitled to recover capital in the amount of $56,570.

28. The partnership's profit for the 166,382 shares would thus be $1,518,236 less $56,570, or $1,461,666, of which plaintiff's one-sixth share would be $243,611.

Plaintiff's loan of less than 65% of the total proceeds of his sales

29. Adjustment must be made for the fact that plaintiff reserved less than the agreed-to 35% of the proceeds of the sale of the first batch of his stock, and more than 35% of the proceeds of the sale of the second batch.

30. The net proceeds of plaintiff's sale of 30,000 shares in the spring of 1988 was $34,500. (Exhibit P6.) By agreement, plaintiff was permitted to reserve 35% of that amount, or $12,075. Plaintiff actually reserved only

$9,500. (Exhibit P10.) As plaintiff reserved $2,575 less than agreed, he is entitled to a credit in that amount.

31. Second, the partnership is entitled to a credit for 65% of the net proceeds of plaintiff's sale of 15,000 shares in late 1988. The net proceeds of those sales was $24,293. (See Exhibit P11.) The partnership is entitled to a credit of 65% of that amount, or $15,790.

32. The net effect of these two adjustments is a credit in favor of the partnership in the amount of $13,215.

Conclusion

33. The total amount due to plaintiff on the accounting is the sum of:

(A) Plaintiff's capital contribution ..... $ 19,066
(¶¶ 1, 3, 11, 13 and 15)

(B) The value of 40,000 shares available for distribution but not previously issued to plaintiff .. $365,000
(¶¶ 5, 6 and 20)

(C) 1/6 of the cash available for distribution after conversion of $300,000 worth of profits into stock..... $ 31,622
(¶¶ 4-6, 16-18 and 20)

(D) 1/6 of the value of the shares not reported by defendants as having been sold prior to dissolution ..... $ 243,611
(¶¶ 1-5, 7-12 and 24-28)

(E) LESS adjustment to equalize reserves at 35%.....< $ 13,215>
(¶¶ 29-32)

TOTAL .....$ 646,084

Defendants jointly and severally liable

34. A partner who renders an untrue account, giving a false balance, becomes liable for property received and not duly accounted for. (*San Pedro Lumber Co. v. Reynolds* (1898) 121 Cal. 74, 89; *Rosenfeld, Meyer & Susman v.* Cohen (1987) 191 Cal.App.3d 1035, 1051-1052.) In this case, all five defendants were represented by the same counsel, and none of the defendants gave a true and complete account of partnership transactions. Under the circumstances, all five are jointly and severally liable for the partnership property not duly accounted for.

35. The payment of plaintiff's share being a partnership obligation, the defendants are jointly and severally liable for it. (Cal. Corps. Code, § 15015(b); *Alioto v. United States* (N.D.Cal. 1984) 593 F.Supp. 1402, 1413.)

Interest

36. The defendants who reported any transactions at all received their capital contributions back in March 1987. Interest on plaintiff's $19,066 capital contribution should, therefore, run from April 1, 1987. (Cal. Corps. Code, § 15018(d).)

37. The defendants all received cash distributions on or about October 20, 1988. (Exhibits P23, P24, P25, P27, P28 and P30.) The net amount of $18,407 in cash due to plaintiff (that is, $31,622 less $13,215) carries interest from that date. (Cal. Corps. Code, § 15018(c, d).)

38. The 40,000 shares that were converted by defendants on or about October 20, 1988, are valued as of the date of dissolution, so interest runs from that date.

39. Interest on the value of the unsold shares runs from the date of dissolution. (Cal. Corps. Code § 15042.)

SO ORDERED.

DATED: AUG 01 2000

Hon. Alexander H. Williams, III
Judge of the Superior Court

IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

MICHAEL J. FRANKSTON, an individual,	CASE NO. BC 107852
Plaintiff,	JUDGMENT
v.	
PATRICK K. GLENN, an individual; NEAL KAUFMAN, an individual; CIPORA KURTZMAN, an individual; ZVI (HARRY) KURTZMAN, an individual; and, ARTHUR SCHWARTZ, an individual,	(C.R.C. Rules 232[c] and 520)
Defendants.	

This matter came before the Court for trial, commencing May 10, 1999, in Department 35, Hon. Alexander H. Williams, III, presiding.

In accordance with (1) the Special Verdict rendered by the jury on Plaintiff's claims for concealment, conversion and breach of fiduciary duty, (2) the Special Verdict rendered by the jury on the issue of punitive damages, and (3) this Court's Statement of Decision re Accounting, judgment is to be entered as follows:

1. In favor of Plaintiff Michael J. Frankston against each of the Defendants, jointly and severally, the following amounts:

(a) Compensatory damages in the amount of $646,084; plus

(b) Prejudgment interest through June 29, 2000, in the amount of $317,828.85; plus

(c) Costs.

2. In favor of Plaintiff Michael J. Frankston against Defendant Patrick K. Glenn, individually, the additional amount of $34,250.00 in punitive damages.

3. In favor of Plaintiff Michael J. Frankston against Defendant Neal B. Kaufman, individually, the additional amount of $34,250.00 in punitive damages.

4. In favor of Plaintiff Michael J. Frankston against Defendant Cipora Kurtzman Lavut, individually, the additional amount of:

(a) $49,397.00 in compensatory damages plus

(b) $71,750.00 in punitive damages.

5. In favor of Plaintiff Michael J. Frankston against Defendant Zvi (Harry) Kurtzman, individually, the additional amount of:

(a) $49,397.00 in compensatory damages plus

(b) $74,250.00 in punitive damages.

6. In favor of Plaintiff Michael J. Frankston against Defendant Arthur J. Schwartz, individually, the additional amount of $43,000.00 in punitive damages.

The foregoing judgment is without prejudice to any partner's right to seek reimbursement for the costs of the accounting, including fees and other expenses not awarded as costs of the action, on appropriate motion.

SO ORDERED.

DATED: AUG 01 2000

Hon. Alexander H. Williams, III
Judge of the Superior Court

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION 7

October 14, 2003

Michael J. Frankston
v.
Patrick K. Glenn

B145777
Los Angeles County No. BC107852

THE COURT:

Petition for rehearing is denied.

cc: All Counsel
File

Court of Appeal, Second Appellate District, Division Seven
– No. B145777
S120157

IN THE SUPREME COURT OF CALIFORNIA
En Banc

(Filed December 23, 2003)

MICHAEL J. FRANKSTON, Plaintiff,
Respondent and Cross-Appellant,

v.

PATRICK GLENN et al.,
Defendants, Appellants and Cross-Repondents.

Petition for review DENIED.

GEORGE,
Chief Justice

RULE 14.1(g)(i) STATEMENT

1. Petition for Rehearing in the Court of Appeal

The constitutional issues having been first created by the initial decision of the Court of Appeal (App. 1-19), Petitioner first raised them in a timely petition for rehearing in that court. Specifically, petitioner argued to the Court of Appeal on rehearing that:

> Rehearing is required in this action, by § 68081 of the government Code, because this Court reached out to reverse an order that Appellants themselves had not challenged, on a theory that had not been presented to the trial court. Doing so *sua sponte* unfairly deprived Frankston of any opportunity to show the Court why the order was proper on the basis of the record before the trial court at that time.
>
> Moreover, rehearing is proper because this Court failed to follow the firmly established "substantial evidence" rule, which requires this Court to "consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the judgment." (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 60). Failure to consider material evidence on a determinative issue warrants rehearing, because an appellate court "must accept as true all evidence and all reasonable inferences from that evidence tending to establish the correctness of the trial court's findings and decision, resolving every conflict in favor of the judgment." (*Grappo v. Coventry Financial Corp.* (1991) 235 Cal. App. 3d 496, 507.) When material evidence is entirely overlooked, or not taken into consideration, the Court cannot fulfill its proper function. Doing otherwise

> improperly invades the province of the triers of fact, here both a jury and a trial court judge.

Petition for Rehearing, at 1-2.

> Hindsight, however, cannot undermine the jury's conclusion that Frankston's conduct was reasonable in light of the circumstances known to him at the time. Such hindsight, indeed, requires arbitrary rejection of unrefuted evidence and inferences supporting the judgment and acceptance of only the contrary evidence – exactly the opposite of this Court's role on appeal.

Petition for Rehearing, at 36.

2. <u>Petition for Review by California Supreme Court</u>

Petitioner then raised the due process issue in a petition to the California Supreme Court for review of the case:

> Whether this case should be heard by this Court or transferred to the Court of Appeal for further proceedings because Government Code, §68081 was violated when the Court of Appeal went behind the evidence submitted at trial of this matter in 1999 and reversed the Superior Court's 1995 rulings on cross-motions for summary adjudication and summary judgment. The Court of Appeal reached this decision even though Appellants had not challenged either ruling, the parties had not discussed or briefed the 1995 rulings, and the Court of Appeal did not have the entire record that was before the trial court in 1995. As a result, Petitioner was not given any opportunity to present his views on the matter through supplemental briefing or on rehearing,

> in violation not only of § 68081 but of Petitioner's due process rights.

Petition for Review, at 1.

> Petitioner, Michael J. Frankston, Plaintiff, Respondent and Cross-Appellant below, seeks review from a decision by the Court of Appeal (a copy of which is attached as Appendix A), that bypassed a detailed jury verdict on special interrogatories and complete findings of fact by the trial court after a lengthy trial in 1999, and reversed pretrial rulings made in 1995 that had not even been challenged by the opposing parties. Review should be granted because this reversal violated the explicit command of § 68081 of the California Government Code, and deprived Petitioner of due process rights by denying him any opportunity to be heard on the validity of the rulings being reversed.

Petition for Review, at 2.

> Because Petitioner, as the prevailing party after trial, had only to show that there was substantial evidence in the record at trial to support the judgment in his favor, mere conflicts in the evidence at trial could not be enough to invalidate findings made by the triers of facts. Petitioner should have been able to prevail on appeal by showing the existence of sufficient evidence at trial in support of the judgment in his favor, without having to show that any issues were undisputed. Of course, had Appellants challenged the validity of the 1995 Rulings by arguing that the evidence in the record before the court at that time had shown a dispute as to a material fact, Petitioner would have had the opportunity and the ability to refute any such argument. The

> lack of opportunity to rebut a contention not even raised by Appellants violated Government Code § 68081 and Petitioner's due process rights, and was severely prejudicial.

Petition for Review, at 5.

> Reversing an order that Appellants did not present any argument against and did not even supply the record necessary for review, without giving Petitioner any opportunity to brief the issues thus raised, is so far beyond the proper bounds of jurisprudence that is expressly forbidden by § 68081 of the Government Code. Refusing a rehearing when timely requested compounds that violation and deprived Petitioner of fundamental due process rights. "Thus, when a person has a legally enforceable right to receive a government benefit provided certain facts exist, this right constitutes a property interest protected by due process. (*Goldberg v. Kelly* (1970) 397 U.S. 254, 261-262 [and other citations].)" (*Schultz v. Regents of University of California* (1984) 160 Cal.App.3d 768, 775.)

Petition for Review, at 19.

> The Court of Appeals' footnote confirming Appellants' right to appeal from the 1995 Rulings cannot retroactively convert an appeal which did not actually challenge those rulings into one that did. As the United States Supreme Court held more than a century ago, "Of course, if the trial court had no jurisdiction, that is a matter which is always open, and the attention of the court of last resort may be called thereto in the first instance; but mere matters of error may always be waived, and they are waived when the attention of the reviewing court is not called to them."

> (*Montana Railway Company V. Warren* (1890) 137 U.S. 348, 351.) This is not an ancient technical rule since discarded (*see, e.g., Graham v. Long Island R.R.* (2d Cir. 2000) 230 F.3d 34, 41), but is fundamental to protection of the due process rights of the party who prevailed below.

Petition for Review, at 24.

> The ultimate violation of Petitioner's rights by the Court of Appeal was its summary denial of Petitioner's timely petition for rehearing. Section 68081, recognizing that parties have a right to be heard on dispositive issues, requires rehearing when a decision is issued without having first invited supplemental briefing. Indeed, rehearing is mandatory to protect the parties' fundamental due process rights.

Petition for Review, at 27.

> Section 68081 of the Government Code requires rehearing by the Court of Appeal in the circumstances presented by this case, to prevent a manifest injustice and the deprivation of Petitioner's due process rights. This Court has the power, pursuant to Rule 28(b)(4) of the California Rules of Court, to order this case transferred to the Court of Appeal for such further proceedings as this Court may direct. Enforcement of § 68081, which cannot be enforced in any other way short of direct review by this Court, is an appropriate circumstance for exercising that power. (*E.g., In re Manuel G.* (1997) 16 Cal.4th 805, 812-813.)

Petition for Review, at 33.